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In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1972

No. 72 - 1566

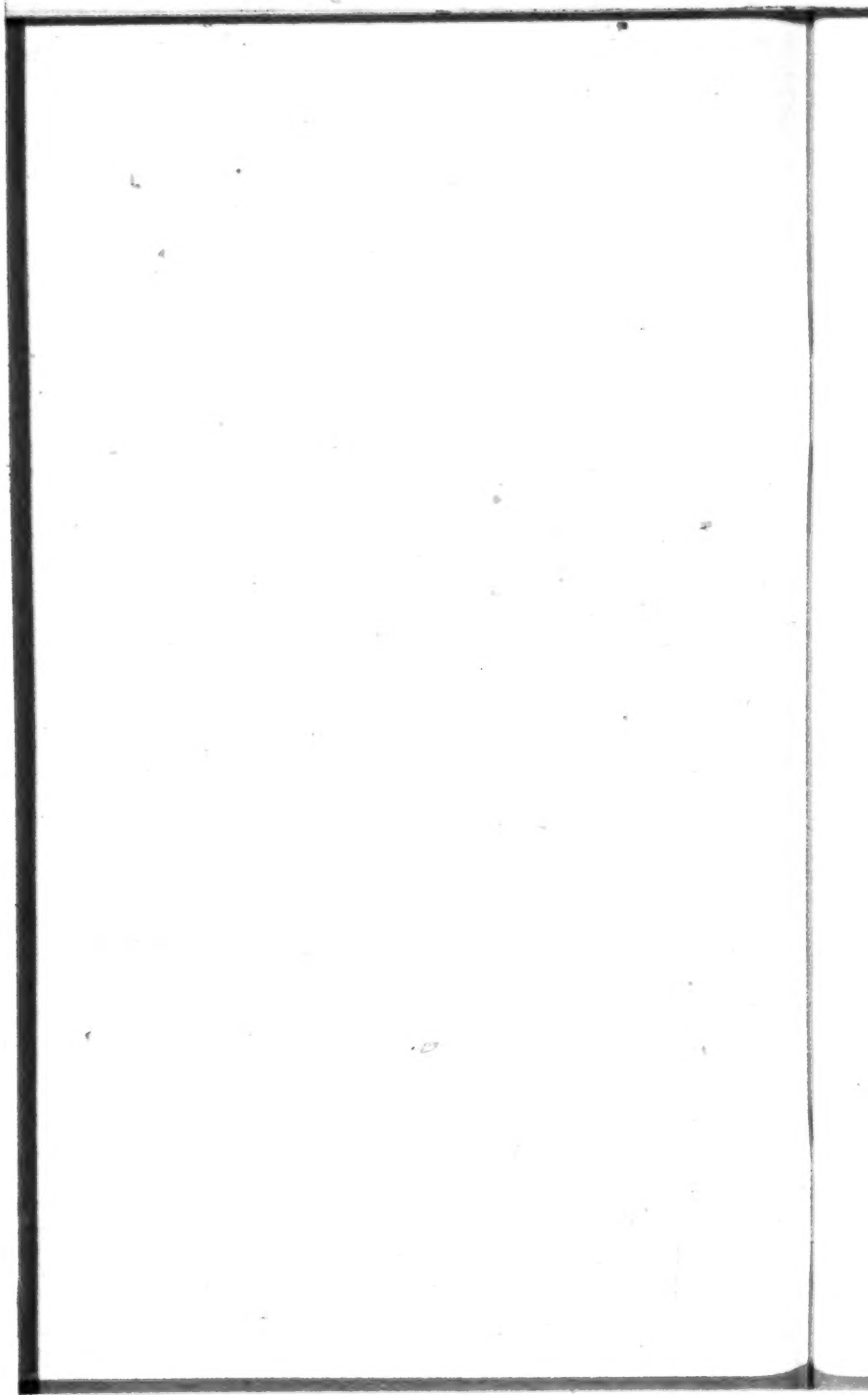
**GRANNY GOOSE FOODS, INC., a corporation, SUNSHINE
BISCUITS, INC., a corporation, and STANDARD BRANDS,
INC., a corporation,
*Petitioners***

VS.

**BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
*Respondent.***

**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

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BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners, Granny Goose Foods, Inc., Sunshine Biscuits, Inc., and Standard Brands, Inc., respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for

the Ninth Circuit reversing an order of contempt entered by the United States District Court for the Northern District of California against Respondent, Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 472 F.2d 764 and appears at Appendix A, *infra*, pp. i-xi. The Order and Judgment of Criminal Contempt of the District Court is unreported and appears at Appendix C, *infra*, pp. xiv-xxi.

JURISDICTION

The Opinion of the Court of Appeals was filed January 18, 1973. A timely petition for rehearing was denied on February 22, 1973. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Federal jurisdiction was invoked herein under 29 U.S.C. §185 by the removal of this case from the Superior Court of the State of California to the United States District Court for the Northern District of California.

QUESTIONS PRESENTED

1. Where a conflict exists between state law and the federal removal statute concerning the effective period of a state court temporary restraining order, which law should apply in determining the effective period of such restraining order after removal of the underlying action to federal court?

2. Where a conflict exists between the Federal Rules of Civil Procedure and the federal removal statute concerning the effective period of a state court order issued prior to removal, which law or rule should apply in determining the effective period of a restraining order after removal of the underlying action to federal court?

3. Does the denial by the district court, after hearing, of a motion to dissolve a removed temporary restraining order constitute the issuance of a preliminary injunction within the meaning of the Federal Rules of Civil Procedure for purposes of enforcement by contempt judgment?

STATUTORY PROVISIONS INVOLVED

This case involves Title 28, Section 1450 of the United States Code, 62 Stat. 940, which provides in relevant part as follows:

"Whenever any action is removed from a state court to a district court of the United States,
* * *

* * *

All injunctions, orders, and other proceedings had in such action prior to its removal shall re-

main in full force and effect until dissolved or modified by the district court."

This case also involves both Rule 65(b) of the Federal Rules of Civil Procedure and Section 527 of the California Code of Civil Procedure, the relevant portions of which are set forth in Appendix D hereto.

STATEMENT OF THE CASE

A. The Proceeding in the Superior Court.

On May 15, 1970, Petitioners Granny Goose Foods, Inc., and Sunshine Biscuits, Inc., sought and obtained a Temporary Restraining Order and Order to Show Cause in the Superior Court of the State of California for the County of Alameda against picketing and work stoppages induced by Respondent at said Petitioners' Alameda County facilities. Petitioners contended that Respondent's strike and picketing activities breached the no-strike and grievance provisions of the collective bargaining agreement then in effect between Petitioners and Respondent (R. 6-12, 30-32). An Amended Complaint was filed on May 18, 1970. The Amended Complaint named Standard Brands, Inc., as an additional party plaintiff and added a party defendant but preserved the same allegations and prayer for relief (R. 42-50). On the same day the Superior Court issued a Modified Temporary Restraining Order extending the coverage of the original order to the parties named in the Amended Complaint and a Show Cause Order with a return date of May 26, 1970 (R. 112, 114).

The following day, May 19, 1970, Respondent and individual Union officer and agent defendants filed a Petition for Removal of the case from state to federal court on the ground that the action arose under 29 U.S.C. §185. The Petition was amended on May 20, 1970, to include the Amended Complaint for injunction (R. 40-41). The case was thereupon removed to the United States District Court for the Northern District of California (R. 33).

B. Proceedings in the District Court Immediately Following Removal.

Once the case had been removed to the district court, Respondent and the other named defendants moved to dissolve the Temporary Restraining Order on the alleged ground that Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104) prohibited the federal court from maintaining the order in effect (R. 34-35). Immediately thereafter Petitioners filed a Motion to Remand (R. 66-67, 68).

The Motions to Dissolve and to Remand were heard on May 27, 1970. At the hearing the court denied the Motion to Remand and took the Motion to Dissolve under submission. On June 4, the court issued its order denying the Motion to Dissolve, relying on this Court's landmark decision in *The Boys Market, Inc. v. Retail Clerks' Union*, 398 U.S. 235 (1970) (R. 123). Thereafter, Respondent took no other action to dissolve the Modified Temporary Restraining Order or otherwise seek further hearings to set aside that order.

C. The Contempt Proceeding in the District Court.

On December 1, 1970, Petitioners filed a Motion for Contempt Judgment, alleging that since on or about November 30, 1970, Respondent had, *inter alia*, engaged in picketing and directed work stoppages at Petitioners' Bay Area facilities, in defiance of the Modified Temporary Restraining Order issued by the Superior Court of Alameda County and continued in effect after removal to the district court (R. 194-198).

The hearing on Petitioners' Motion for Contempt Judgment was held on December 2, 1970. At the conclusion of the hearing the court adjudged Respondent in willful contempt of an Order of the court which remained in full force and effect by reason of the provisions of the federal removal statute, 28 U.S.C. §1450 (Tr. 82, 85).

D. The Decision of the Court of Appeals.

A divided Court of Appeals reversed, two to one, the district court's judgment of contempt and vacated the contempt proceedings. In so doing, the Court majority held that the Modified Temporary Restraining Order issued by the state court could not, even after its removal to federal court, survive beyond June 7, 1970, the date the Court considered to be the injunction's last effective date under California law¹

¹It is significant that the Court of Appeals misapplied California law, which does not limit the effectiveness of a temporary restraining order to a mere 20 days under circumstances such as exist herein. In fact, California law is flexible on this point: A temporary restraining order does not necessarily expire after 15 or 20 days. Section 527 of the California Code of Civil Procedure (see Appendix D, *infra*) expressly permits the continuance of a tem-

and/or Rule 65(b) of the Federal Rules of Civil Procedure. The majority opinion disregarded the plain and unqualified language of Section 1450. As the dissent pointed out, the majority also failed to consider the decisions of other Circuits unanimously holding that unless the federal court dissolves the state court temporary restraining order, that order remains in effect in federal court regardless of state law, and regardless of any time limitations imposed by Rule 65(b) of the Federal Rules of Civil Procedure. *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *General Elec. Co. v. Local Union 191*, 413 F.2d 964, 966 (5th Cir. 1969), *vacated and remanded on other grounds*, 398 U.S. 436 (1970); *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

REASONS FOR GRANTING THE WRIT

This case presents an important issue of first impression dealing with clear conflicts between the Federal removal statute and the Federal Rules of Civil Procedure. More specifically, a substantial question is presented with regard to the effect of Section 1450

porary restraining order for "a reasonable period" beyond 15 or 20 days as a matter of course to allow the defendant to meet the application for a preliminary injunction. The restraining order may likewise be continued in effect beyond such period by stipulation of the parties, or "when the necessary business of the court prevents it from hearing the matter within that time." *McDonald v. Superior Court*, 18 Cal.App.2d 652, 657 (1937). Thus, state policy is not to impose an automatic termination date on restraining orders in every case.

on the duration of state court orders in cases removed to federal court when such section conflicts with state law and the Federal Rules of Civil Procedure. This question affects the fair and uniform administration of the federal courts. It also involves a conflict of decisions and analyses among Circuit Courts of Appeals and in the Ninth Circuit itself. Until this issue is resolved, litigants in the Ninth Circuit will be subject to a more stringent rule regarding the duration of removed orders than litigants in other Circuits. Moreover, both litigants and the federal courts will remain uncertain as to the proper construction of Section 1450, Title 28, United States Code.

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH SECTION 1450 OF TITLE 28 OF THE UNITED STATES CODE.

The language of Section 1450 is plain and unqualified: *All state court orders are to remain in full force and effect in federal court after removal. Only if the federal court dissolves or modifies such a removed order does it cease to be effective.*

The majority opinion in the Court of Appeals disregards the plain and unqualified language of Section 1450. The majority decided that Section 1450 serves merely to "prevent a break" in the effectiveness of an existing state order upon its removal to federal court, so that such order does not expire before the date when it would otherwise have expired in state court.²

²The Ninth Circuit majority offers no authority for its novel interpretation of Section 1450.

According to the analysis of the majority, a removed order continues to be subject to state law and policy. Therefore, the duration of a removed order in federal court is no greater than it is under state law. Furthermore, according to the majority opinion, the duration of the removed order is subject to the time limits set by Rule 65(b)³ of the Federal Rules of Civil Procedure.

Nowhere does the removal statute itself support such a construction of the law. Section 1450 makes no reference to state law or policy. Nor does it refer to any other federal law. Rather, it provides that a removed order shall expire only in the event that the federal court dissolves it. Had Congress intended to defer to state policy regarding the duration of orders or to Rule 65(b) of the Federal Rules of Civil Procedure, it would have been a simple matter to draft Section 1450 to accomplish that purpose. Instead, however, *the statute prescribes in absolute terms, without reference to extrinsic law or policy, the duration of all orders removed to federal court.*

2. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING THE EFFECT OF TITLE 28, SECTION 1450, UNITED STATES CODE, ON THE DURATION OF REMOVED ORDERS.

Several recent decisions in other Circuits consider the effect of Section 1450 on temporary restraining orders in cases removed to federal court. All of these

³See Appendix D hereto.

decisions in other Circuits interpret Section 1450 differently from the Ninth Circuit. In each case the other circuits have determined that Section 1450 precludes the automatic termination of a removed order. Thus, in *Appalachian Volunteers, Inc. v. Clark, supra*, the Sixth Circuit rejected the contention that a temporary restraining order granted by a state court in a case subsequently removed to federal court expired no later than ten days after the removal petition was filed, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. Quoting Section 1450, the Court held that (*Appalachian Volunteers, Inc. v. Clark, supra*, 432 F.2d at 533):

“This clear statutory command must take precedence over the arguably contrary rule of procedure, and it would seem to *preclude the automatic termination* of the temporary restraining order obtained in the state court.” [Emphasis added.]

In an earlier case the same Circuit ruled that by reason of Section 1450 affirmative action by the federal court in the form of a dissolution order is required to render a state court order ineffective after removal. *Munsey v. Testworth Laboratories*, 227 F.2d 902, 903 (6th Cir. 1955).

The Second Circuit reached the same conclusion concerning the effect of Section 1450 in *Morning Telegraph v. Powers, supra*. In that case, the *Morning Telegraph* had obtained an *ex parte* temporary restraining order against the defendant union in state court. The Second Circuit said in dicta that the “restraint was to continue in effect until a hear-

ing scheduled for March 3, 1971, but was extended automatically by 28 U.S.C. §1450 [footnote omitted] when removed by the Union to the federal district court * * *." *Morning Telegraph v. Powers*, *supra*. 450 F.2d at 98.

The Fifth Circuit, in *General Elec. Co. v. Local Union 191*, *supra*, held that the court below properly granted the defendant's motion to dissolve a state court temporary restraining order after removal of the case. Citing Section 1450, the Court said that (*General Elec. Co. v. Local Union 191*, 413 F.2d at 966):

"We are of the view that the District Court did not err in dissolving the injunction * * * because, in our view, once this case was removed, a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal court * * *." 413 F.2d at 966.

Furthermore, federal district courts in other Circuits have consistently held that a removed order does not expire automatically, but continues in effect unless it is dissolved by the federal court. In *Peabody Coal Co. v. Barnes*, 308 F.Supp. 902, 903 (E.D. Mo. 1969), the Court held that:

"Under Section 1450, 28 U.S.C., the temporary restraining order issued by the state court remains in full force and effect after the removal *until and unless dissolved by this Court.*" [Emphasis added.]

In that case the Court ruled that Section 1450, not Rule 65(b), applied to the removed order. As a re-

sult, a temporary restraining order issued by a state court remained in effect *two and a half months* after its removal to the district court, until the district court dissolved it.

In *The Herald Co. v. Hopkins*, 325 F. Supp. 1232 (E.D.N.Y. 1971), the defendant union removed the underlying action to federal court after the plaintiff obtained a temporary restraining order against the defendant's strike and work slowdown. Defendant then moved to vacate the state court order. In ruling on the motion, the district court stated in dicta (*The Herald Co.*, *supra*, 325 F.Supp. at 1233):

"Of course, under 28 U.S.C. §1450, the State restraining order has remained in effect pending consideration of the motions and rendering of this decision."

In all of the above decisions applying and construing Section 1450, the courts concluded that a removed state order *does not* expire automatically on its termination date under state law, nor ten days after its removal under Rule 65(b). *Without exception, the courts of other Circuits have determined that only dissolution by the federal court terminates such a state court order.*

The majority opinion of two members of the Ninth Circuit panel which decided the appeal in this case makes no mention of the conflicting decisions of other Circuits. Such opinion further fails to attempt to reconcile the majority's reading of Section 1450 with either the plain language of the statute itself or the existing case law on this issue.

There is a clear conflict between the Ninth Circuit and other Circuits as to the effect of Section 1450 on the duration of removed state orders. If the Ninth Circuit's decision is allowed to stand, litigants in that Circuit will lose the benefit of a state court order after removal on the date state law provides, whereas litigants in other Circuits will be able to rely on such a state order indefinitely, so long as the district court does not modify or dissolve it. It is therefore respectfully submitted that *certiorari* should be granted so that this inequity may be prevented and uniform treatment of litigants in removed actions obtained.

3. THE COURT OF APPEALS' DECISION DEFERRING TO STATE LAW AND POLICY ON THE DURATION OF RESTRAINING ORDERS CONFLICTS WITH AND CONTRAVENES DECISIONS OF THIS COURT HOLDING THAT FEDERAL LAW GOVERNS QUESTIONS OF PROCEDURE IN THE FEDERAL COURTS.

The majority opinion's deference to state law and policy regarding the duration of restraining orders not only contravenes the language of Section 1450 and existing authorities construing that statute but also ignores the established rule that state law has no application to questions of procedure once a case has been removed to federal court. Such questions are governed by federal law. *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Hanna v. Plumer*, 380 U.S. 460 (1965).

The duration of a restraining order is a procedural matter governed by federal law, even though the

choice of that law affects the outcome of the case. In *Munsey v. Testworth Laboratories, supra*, the Sixth Circuit held that a default judgment rendered by a state court prior to removal was subject to being set aside by the federal court after removal, just as it would have been in state court before removal. But federal, not state, law determined the time in which the court was required to act to set aside the judgment. Similarly, federal law controls the time in which a motion to set aside a state court order after its removal to federal court must be made. *Butner v. Neustadter*, 324 F.2d 783, 785-786 (9th Cir. 1963).

Thus, the federal courts, adhering to the decisions of this Court, have treated questions of time limitations on court orders and proceedings as procedural, and have looked to federal law to resolve them. In the instant case, the duration of the Modified Temporary Restraining Order after removal to federal court was such a matter of procedure. Federal law thus determined the question of how long that Order remained in effect. Contrary to the opinion of the Court of Appeals majority, state law could have no part in the determination of that question.

4. THE COURT OF APPEALS IS DIVIDED ON THE PROPER CONSTRUCTION OF SECTION 1450

In the United States Court of Appeals for the Ninth Circuit, itself, there is no uniformity of opinion on the proper construction of Section 1450. The two-member majority in the instant case holds that

Section 1450 is limited by state law and Rule 65(b) of the Federal Rules of Civil Procedure. In a sharp dissent the third member of the panel, Judge Trask, finds the majority's reading of Section 1450 to be at odds with the language of the statute itself (Appendix A, pp. vi-xi), and their deference to state law and policy an unwarranted departure from federal cases holding that federal law governs questions of procedure in federal court. He concludes that the district court's judgment should be affirmed.

This division within the Court of Appeals, which compounds the majority's break with the decisions of other Circuits, constitutes an additional compelling reason for granting *certiorari* to remove all doubt concerning the meaning of Section 1450 and the interrelation between this federal statute, the Federal Rules of Civil Procedure and state law.

5. CERTIORARI SHOULD BE GRANTED HERE TO RESOLVE AN ISSUE AFFECTING THE ADMINISTRATION OF THE FEDERAL COURTS.

The construction given to Section 1450 determines the duration of removed orders in federal district court, and thus determines, as in this case, whether the district court can recognize and enforce such orders after removal without regard to state law. Further, the construction given to Section 1450 determines whether the plaintiff—beneficiary of the state court order—has the burden of seeking an extension of that order in federal court, or whether the de-

fendant has the burden of persuading the district court to dissolve or modify the order.

This Court, as rule-maker for the federal court system, has both the authority and the special competence to decide these questions of procedure for the federal courts. It is thus particularly important that *certiorari* be granted to review the issues presented herein.

6. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DISTRICT COURT'S DENIAL OF A MOTION TO DISSOLVE A REMOVED STATE COURT TEMPORARY RESTRAINING ORDER CONSTITUTES THE GRANTING OF A PRELIMINARY INJUNCTION.

The Court of Appeals majority rejected any contention that the state court temporary restraining order effectively became a preliminary injunction when the district court denied Respondent's motion to dissolve the order.

"The Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate."

(Appendix A, p. vi.)

This conclusion squarely conflicts with the decisions of other Circuits on the same question. In *Morning Telegraph v. Powers*, *supra*, 450 F.2d at 99, the Second Circuit held that after removal of the case

"* * * the practical effect of the refusal (of the district court) to dissolve the temporary restrain-

ing order was the equivalent of a grant of preliminary injunctive relief."

Other Circuits and district courts have reached the same conclusion. *Appalachian Volunteers, Inc. v. Clark*, *supra*. *General Elec. Co. v. Local Union 191*, *supra*. See also, *Peabody Coal Co. v. Barnes*, *supra*.

Judge Trask's dissent in the instant case, citing these decisions of other Circuits, disagrees with the majority as to the effect of the district court's denial, after hearing, of Respondent's motion to dissolve the Modified Temporary Restraining Order.

"The motion to dissolve was denied upon that hearing leaving the order of restraint against the Union in full force and effect. At this point the case was in exactly the same posture as it would have been had the order to show cause been heard and the preliminary injunction granted on that order pending a trial on the merits of the permanent relief. The temporary restraining order had been disposed of by hearing and decision. The order continuing the restraint was, in effect, a preliminary injunction pending a hearing on the merits."

(Appendix A, p. viii.)

The question of how the denial of a motion to dissolve a restraining order affects the duration of that order is a further ramification of the conflict among the removal statute, the Federal Rules of Civil Procedure and state law. The absence of a uniform rule in this area among the Circuits can only create inequities among litigants. This problem is further com-

plicated in cases involving Section 301 of the National Labor Relations Act, as amended (29 U.S.C. §185), because of this Court's overriding concern with uniform treatment of litigants regardless of forum. *Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). This Court, therefore, should determine whether the denial of a motion to dissolve an order is tantamount to the issuance of a preliminary injunction.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 17, 1973.

(Appendices Follow)

Appendix A

**United States Court of Appeals
for the Ninth Circuit**

No. 26838

**Granny Goose Foods, Inc., a corporation,
and Sunshine Biscuits, Inc., a corpora-
tion, Standard Brands, Inc., a corpo-
ration,**

Plaintiffs-Appellees,

vs.

**Brotherhood of Teamsters & Auto Truck
Drivers, Local No. 70 of Alameda County,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers of
America,**

Defendant-Appellant.

[Filed Jan. 18, 1973]

**Appeal From the United States District Court
for the Northern District of California**

**Before: DUNIWAY, HUFSTEDLER, and TRASK,
Circuit Judges**

HUFSTEDLER, Circuit Judge:

**The Union appeals from an order holding it in
criminal contempt for violating a temporary restrain-**

ing order. We reverse because the order expired by operation of law after removal of the cause to the federal court and before the alleged contumacious conduct occurred.

Granny Goose Foods, Inc., and Sunshine Biscuits, Inc. ("Employers"), commenced the action in a California state court by filing a complaint charging the Union with breach of a collective bargaining agreement. It simultaneously filed an application for a temporary restraining order. On May 15, 1970, the state court, *ex parte*, issued a temporary restraining order and an order to show cause why a preliminary injunction should not be granted, made returnable on May 26, 1970. On May 18, 1970, Employers filed an amended complaint virtually identical to the original complaint except for the addition of new parties. On the same date the state court, *ex parte*, issued a modified temporary restraining order reflecting the change in parties and likewise modified the order to show cause, returnable May 26, 1970.

On May 19, 1970, the Union filed a petition to remove the action to the federal court. The following day it filed an amended petition to remove naming the new parties. Immediately after removal, the Union filed a motion to dissolve the temporary restraining order, noticed for May 22, 1970, a date within the life of the state order. Employers simultaneously filed a motion to remand, also noticed for May 22, 1970. Because the case was transferred from one federal judge to another, the motions were not heard until May 27, 1970. The district judge denied

the motion to remand on May 27, and it submitted the motion to dissolve.

While the motion to dissolve was pending, the Supreme Court decided *Boys Market, Inc. v. Retail Clerks Union* (1970) 398 U.S. 235, a decision that destroyed the foundations of *Sinclair Refining Co. v. Atkinson* (1962) 370 U.S. 195, on which the Union's dissolution motion had been based. On June 4, 1970, the district court denied the motion to dissolve. There was no further action until the proceedings to obtain a contempt order were brought on December 1, 1970, charging the Union with violating the modified temporary restraining order by commencing strike and picketing activities against Employers on November 30, 1970. Employers never applied to the district court for a preliminary injunction. Contempt proceedings, begun on December 2, 1970, concluded with an adjudication of criminal contempt in which a substantial fine was imposed on the Union. This appeal followed.

If the action had been retained by the state court, the temporary restraining order would have expired by operation of law not later than 20 days after issuance of the modified order, i.e., June 7, 1970 (Cal. Code Civ. Proc. § 527¹). If the restraining order had

¹Section 527 provides:

"An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. . . .

"No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless

been initially granted by the federal district court, it would have expired not later than June 7, 1970, under the provisions of Rule 65(b) of the Federal Rules of Civil Procedure.³

it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. . . ."

We recognize that, under state law, the temporary restraining order would have expired on the specified return date, May 26, 1970. (*E.g.*, *Sharpe v. Brotzman* (1956) 145 Cal. App. 2d 354.) But we assume that the Union would have moved the state court to dissolve, as it did in the federal court, and that there would possibly have been continuances of the return date within the 20-day maximum permitted by statute.

³Rule 65(b) provides:

"A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to

Employers contend that the life of the temporary restraining order was indefinitely prolonged by the provisions of 28 U.S.C. § 1450: "All injunctions, orders, and other proceedings had in such [removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." The temporary restraining order was neither dissolved nor modified by the district court; therefore, it says, the order remained in full force and effect.

Section 1450 does not create a special breed of temporary restraining orders that survive beyond the life

give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

For the purpose of this discussion we assume, *arguendo*, but we do not decide that Union's motion to dissolve was a consent to hold the matter in status quo until the motion could be decided and that it was, to that extent, a consent to an extension of the order within the exception to Rule 65(b).

span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court. Section 1450 permits transfer to the federal court of state court restraining orders without any loss of potency during the trip. It adds nothing to the terms of state orders. The purpose of section 1450 is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted. Employers' construction of section 1450 would offend the policy of California and federal policy imposing strict limitations on the longevity of temporary restraining orders. The temporary restraining order could not survive beyond June 7, 1970, the last day within its maximum state life, a date months before the alleged contumacious acts transpired.

If Employers wanted a preliminary injunction, they easily could have sought one. They did not do so. The Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate.

The order is REVERSED and the contempt proceedings are vacated.

TRASK, Circuit Judge, dissenting:

The issue upon which this court is called to rule, is the effect of 28 U.S.C. § 1450 on the duration of a

temporary restraining order issued by a state court in a case which is then removed to the federal court.

Had the case not been removed, the California Code of Civil Procedure would have caused such a temporary restraining order issued *ex parte* to be extinguished in a maximum of 20 days; had the same order been issued originally in the federal court, it would have ceased to exist in the same period of time.

When such a case, with an outstanding restraining order issued and pending, is removed, it becomes subject to 28 U.S.C. § 1450 which provides in pertinent part:

"All injunctions, orders, and other proceedings had in [a removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

The majority of the court is of the opinion that the purpose of this section is to "prevent a break" in the continuity of a restraining order that "could otherwise occur" during the change from state to federal court. It would seem that if such were the purpose, the statute could have very simply said so. Or, the Congress could have provided that the restraint should not in any event continue in effect for a greater period of time than that provided by the state statute or the state court's order. It did not. It provided very simply, but very clearly, that all injunctions should remain in full force and effect "until dissolved or modified by the district court." It thus requires affirmative action on the part of one of the parties before it may be dissolved or modified.

And if the district court refuses to dissolve it, the temporary restraining order issued *ex parte* remains in force until the case is tried on its merits and the temporary injunction or permanent injunction is granted or denied.

In this case the pleadings disclose that the employers, as plaintiffs, filed a complaint and then an amended complaint seeking relief against the defendant Union's alleged unlawful interference with its activities. The complaint sought a permanent injunction. It also asked for a temporary restraining order pending a hearing on an order to show cause and that a preliminary injunction be granted upon the hearing of the order to show cause to continue during the pendency of the action. The action was removed to federal court before the return date of the order to show cause in the state court. But the Union promptly filed a motion in federal court to dissolve the temporary restraining order and caused the motion to be brought to a hearing. The motion to dissolve was denied upon that hearing leaving the order of restraint against the Union in full force and effect. At this point the case was in exactly the same posture as it would have been had the order to show cause been heard and the preliminary injunction granted on that order pending a trial on the merits of the permanent relief. The temporary restraining order had been disposed of by hearing and decision. The order continuing the restraint was, in effect, a preliminary injunction pending a hearing on the merits. *Morning Telegraph v. Powers*, 450 F.2d 97, 99 (2nd Cir. 1971), cert. denied, 405 U.S. 954 (1972); *Appalachian Vol-*

unteers, Inc. v. Clark, 432 F.2d 530, 533 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971). *Morning Telegraph, supra*, points out that in applying the distinction between a temporary restraining order and a preliminary injunction,

"... the label put on the order by the trial court is not decisive." Wright, *Federal Courts* 459 (2d ed. 1970), quoted with approval in *Belnap v. Leary*, 427 F.2d 496, 498 (2d Cir. 1970). Here, the practical effect of the refusal to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief. *Peabody Coal Co. v. Barnes*, 308 F.Supp. 902 (E.D. Mo. 1969)." 450 F.2d at 99.

In *Peabody Coal Co. v. Barnes, supra*, the district court said, "[u]nder Section 1450, 28 U.S.C., the temporary restraining order issued by the state court remains in full force and effect after the removal until and unless dissolved by this Court." 308 F.Supp. at 903. In that case the temporary restraining order issued without notice remained in effect some two and one-half months without a request for a hearing.

Indeed, the California courts appear to follow the same reasoning. In *Gray v. Bybee*, 60 Cal. App. 2d 564, 141 P.2d 32, 35 (1943), the court said:

"The granting or denial of a temporary restraining order is discretionary with the trial judge (14 Cal.Jur. 180, sec. 7) and amounts to a mere preliminary or interlocutory order to keep the subject of litigation in status quo pending the determination of the action on its merits. *People v. Black's Food Store*, 16 Cal.2d 59, 105 P.2d 361, 362; 14 Cal.Jur. 180, sec. 9."

It is asserted here that if the employers had wanted a preliminary injunction they could easily have sought one. They did seek one in their pleadings. After the trial court denied the motion to dissolve there was no reason for the employers to take the initiative. The restraint they sought had been obtained. Had the Union desired to litigate the merits of the trial court's refusal to dissolve the temporary restraining order, the Union could easily have done so, either by an appeal from the trial court's order, treating it as the grant of a preliminary injunction, *see Morning Telegraph v. Powers, supra*, or by bringing the case on for trial on the merits. It did neither.

The argument that to construe Section 1450 according to its plain language would somehow offend the policy of California and, therefore, the California time limitation should control, is difficult to follow. It is well established that once a case is removed from state court to federal court, questions of procedure are governed by federal law and not state law. For instance, the time in which to file an amended complaint is governed by federal law and not state law.

Mr. Justice Douglas said in *Freeman v. Bee Machine Co.*, 319 U.S. 448, 452 (1943):

"The jurisdiction exercised on removal is original not appellate. *Virginia v. Rives*, 100 U.S. 313, 320. The forms and modes or proceeding are governed by federal law. *Thompson v. Railroad Companies*, 6 Wall. 134; *Hurt v. Hollingsworth*, 100 U.S. 100; *West v. Smith*, 101 U.S. 263; *King v. Worthington*, 104 U.S. 44; *Ex parte Fisk*, 113 U.S. 713; *Northern Pacific R. Co. v. Paine*, 119

U.S. 561; *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684; *Rorick v. Devon Syndicate*, 307 U.S. 299."

Similarly, where a conflict exists between state rule and federal rule as to service of process in a diversity jurisdiction case, the federal rule applies. *Hanna v. Plumer*, 390 U.S. 460 (1965). See also, *Seal v. Industrial Electric, Inc.*, 362 F.2d 788 (5th Cir. 1966). A federal court was not limited by a state 30-day rule to set aside a default judgment. *Munsey v. Testworth Laboratories, Inc.*, 227 F.2d 902, 903 (6th Cir. 1955).

So, in this case I would hold that Section 1450 protects the restraining order during its removal trip and preserves it as it reaches its destination in the federal court. At that point federal procedural and statutory rules take control. Rule 65(b) Fed. R. Civ. P. would prevail over the state rule as to termination, and the "clear statutory command [of Section 1450] must take precedence over the arguably contrary rule of procedure [of Rule 65(b)]." *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970).

I would therefore conclude that the temporary restraining order continued in existence as a preliminary injunction after hearing by the district court and its denial of the motion to dissolve the restraint. The order of contempt was not clearly erroneous and the judgment of the trial court should be affirmed.

/s/ Ozell M. Trask

United States Circuit Judge

Appendix B

**United States Court of Appeals
for the Ninth Circuit**

No. 26838

**Granny Goose Foods, Inc., a corporation,
Sunshine Biscuits, Inc., a corporation,
Standard Brands, Inc., a corporation,
Plaintiffs-Appellees,**

vs.

**Brotherhood of Teamsters & Auto Truck
Drivers, Local No. 70 of Alameda County,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers of
America,
Defendant-Appellant.**

[Filed Feb. 22, 1973]

ORDER

**Before: DUNIWAY, HUFSTEDLER, and TRASK,
Circuit Judges**

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

**In the United States District Court
Northern District of California**

Before: HON. ALFONSO J. ZIRPOLI, JUDGE

No. C 70 1057

<p>Granny Goose Foods, Inc., et al.,</p> <p>vs.</p> <p>Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, et al.,</p>	}	<p>Plaintiffs,</p> <p>Defendants.</p>
--	---	---

[Filed Dec. 2, 1970]

Appearances:

For Plaintiffs:

George J. Tichy, II, Esq.

Wesley J. Fastiff, Esq.

J. Richard Thesing, Esq.

For Defendants:

Duane B. Beeson, Esq.

Kenneth N. Silbert, Esq.

REPORTERS' TRANSCRIPT

December 2, 1970

Wednesday

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER AND JUDGMENT OF CRIMINAL CONTEMPT

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. ATTEST:

E. C. Evensen,
Clerk, U.S. District Court
Northern District of California

/s/ By Edward C. Evensen
Deputy Clerk

Dated Dec. 2, 1970

December 2, 1970—Wednesday

[Reporter's partial transcript.]

* * * * *

The Court: All right, then, considering the nature of the case, the urgency involved, the case is submitted and I am going to make a ruling now.

To be specific and dispel any suspense, it's obvious to me that the Defendant Union is in contempt of the order of the Court, and that I must accordingly enter judgment based upon that contempt.

This case had its origin in an action filed in the Superior Court of the State of California in and for the County of Alameda, in which the plaintiffs sought to restrain certain picketing and work stoppage activities of the defendants. The Honorable Lewis E. Ler-

cara of said Superior Court, on May 18, 1970, entered a modified temporary restraining order against the defendants which enjoins the defendants, Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Robert Laird, James Muniz, Joseph Areno, Louis Riga, Charles Mack, Lawrence Diaz, Edward Painter, Alex Ybarralozza, Leroy Nunes, Stanley Botello, Ronald Rocha, Art Soto, Jack Sweeny, Richard S. Durasette, Robert Windsor, Al Leishman and Richard Sarmamento, and each of them, and their officers, agents, representatives, employees and members, and each and every and all other persons acting at the direction of or in concert with said defendants, enjoining them from:

a. Directing or ordering or otherwise inducing, the employees of the plaintiffs not to perform work for any of said companies;

b. Picketing at any facility or situs of equipment of the plaintiffs where the effect of such picketing is to induce, encourage or cause company employees not to work for plaintiffs;

c. Engaging in any activity for the purpose of causing or with the effect of causing, a stoppage of work for, or strike against plaintiffs;

d. Failing to withdraw any orders or directions to employees of plaintiffs that said employees should engage in a cessation of work for such companies.

A copy of that modified temporary restraining order was duly and timely served upon the Defendant

Union, as appears from the affidavit on file in these proceedings and the stipulation arising in connection with the testimony of Mr. Farrell.

Thereafter, on May 18, 1970, the defendants petitioned to remove the said cause to this Court under the provisions of Section 1441 of Title 18, U.S. Code, on a claim that this Court has original jurisdiction under Section 301 of the National Labor Relations Act as amended, 29 U.S.C. Section 185, and at the same time moved to dissolve the injunction of the State Court on the ground that an injunction issued by a State Court against striking and picketing activities by a labor organization and its agents must be dissolved for lack of jurisdiction by a Federal Court following removal of the proceedings, citing as authority *Sinclair Refining Company v. Atkinson*, 370 U.S. 195.

On May 22nd, 1970, the plaintiffs moved to remand the case to the said Superior Court. Following a hearing in this Court on May 27, 1970, this Court denied the motion for remand, and on June 4, 1970, entered its formal order denying defendants' motion to dissolve the State Court's temporary restraining order. That denial of the motion to dissolve the restraining order was based on the case of *Boys Market, Inc., v. Retail Clerks' Union, Local 770*, decided by the Supreme Court on June 1, 1970, wherein the Supreme Court expressly overruled its prior decision in the *Sinclair* case, *supra*, upon which the defendants had relied.

The order of the Court of June 4, 1970, provides in its pertinent part:

"The only issue now before the Court is whether or not the District Court is mandated to dissolve the State Court temporary restraining order. The Supreme Court decision in the recent case of Boys Market, Inc., v. Retail Clerks' Union, Local 770, _____ U.S. _____ (June 1, 1970), is dispositive of the issue. Accordingly, IT IS ORDERED that the motion to dissolve the State Court temporary restraining order is denied."

The order was dated June 4, 1970.

Defendants' continuing contention that the order of Judge Lercara is no longer in effect is without merit, not only by reason of the order of this Court which denies the motion to dissolve the same, thereby leaving it in continuing full force and effect, but also by reason of the provisions of the Federal removal statute, namely, Section 1450 of Title 28, United States Code, which in its pertinent part provides:

"All injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the District Court."

The Court further notes that since the entry of that order of June 4th, nothing was done to bring this case at issue and as far as the record discloses, there is no answer on file on the part of the defendants herein.

The Court further notes that the basic objection, and the only objection made a matter of written rec-

ord in the form of a formal motion, was the motion to dissolve on the theory that the Sinclair decision was applicable.

Under all these circumstances, the Court is satisfied that the matter is properly before it on an order to show cause why the defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, should not be found in contempt by reason of the alleged activities on the part of the Union, or caused directly by the Union.

This Court, after having heard all of the evidence before it, including the testimony of the witnesses Crall, Dreher and Ranche, and the stipulation with relation to the exchange of correspondence between counsel evidenced by the affidavit of Wesley J. Fastiff, is satisfied that the said defendant, Local No. 70, is in contempt of the order of this Court. It is satisfied that the contempt was deliberate and designed to flout the order of this Court.

One must bear in mind, as the Supreme Court again said in *United States v. Mineworkers*:

"The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and wilfully refuses his obedience does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the wilfully and

deliberate defiance of the Court's order and the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendants' defiance as required by the public interest and the importance of deterring such acts in the future. Because of the nature of such standards, great reliance must be placed upon the discretion of the trial court."

The Court in its discretion having found from the testimony and the affidavits which I have just alluded to—the Court is satisfied that the Defendant Union, or Respondent Union in this case, did in fact comport itself in such manner as to direct and order employees of the plaintiff not to work for any of the companies involved herein, namely, Granny Goose Foods, Sunshine Biscuits, Inc., and Standard Brands, Inc., that the Union did direct and order the picketing of the facilities and situs of equipment of these three named companies, where the effect of the picketing was to induce, encourage or cause employees not to work for plaintiffs; that the Union engaged in activities for the purpose of causing, or with the effect of causing, a work stoppage for or strike against the three companies I just indicated; that the Union has failed to withdraw any orders or directions to employees of these three companies that said employees should engage in a cessation of work for such companies.

Now, having indicated that this was a wilful form of conduct on the part of the defendant, Local 70, it constitutes, as such, an attempt to repudiate and override the instrument of Government in the situ-

ation where Government action may be or is indispensable.

Based upon these findings, the Court concludes and finds that the defendant Local No. 70 is in contempt of an outstanding order of this Court. And it appearing that the violation of the Court's order was in open and flagrant defiance of the order of the Court, it is adjudged that the defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association, be fined in the sum of \$200,000, to be paid into the Treasury of the United States through the Clerk of this Court.

\$150,000 of that fine is conditional on the said defendant's failure to purge itself within 24 hours of the date and hour of the signing of the Court's order; \$100,000 of said fine is conditioned upon the said defendant's, namely, Local No. 70, failure to purge itself within 48 hours of the date and hour of this order; and \$50,000 of said fine is conditioned upon the said defendant's, Local No. 70, failure to purge itself within 72 hours of the date of the signing of the Court's order.

Counsel for the petitioner and plaintiff are directed to secure a transcript of the proceedings, at least a transcript of the order of this Court as orally pronounced, reduce the same to writing and submit it for the Court's signature.

Mr. Silbert, I assume you did the best you could under the circumstances. It is unfortunate that the Court was faced with a situation in which it had to find the defendant Union in contempt of Court. When the Court does so, it wants counsel to understand that despite the action taken by the Court, the Court does not mean in any way to appear to be punishing counsel or to appear to be unhappy with counsel. I recognize that the lawyers in any case and in every case must make the best of whatever situation confronts them at the time.

All right.

Mr. Silbert: Your Honor, we intend to appeal your decision, and I'd request a stay of your order pending appeal.

The Court: Well, I will grant you a stay of the order upon the deposit of a bond of \$1,000,000 to cover damages.

Mr. Silbert: Thank you, Your Honor.

December 2, 1970, Wednesday at 5:45 p.m. AJZ

Alfonso J. Zirpoli

Judge of the United States

District Court

Appendix D

Rule 65(b) of the Federal Rules of Civil Procedure provides as follows:

(b) **Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same

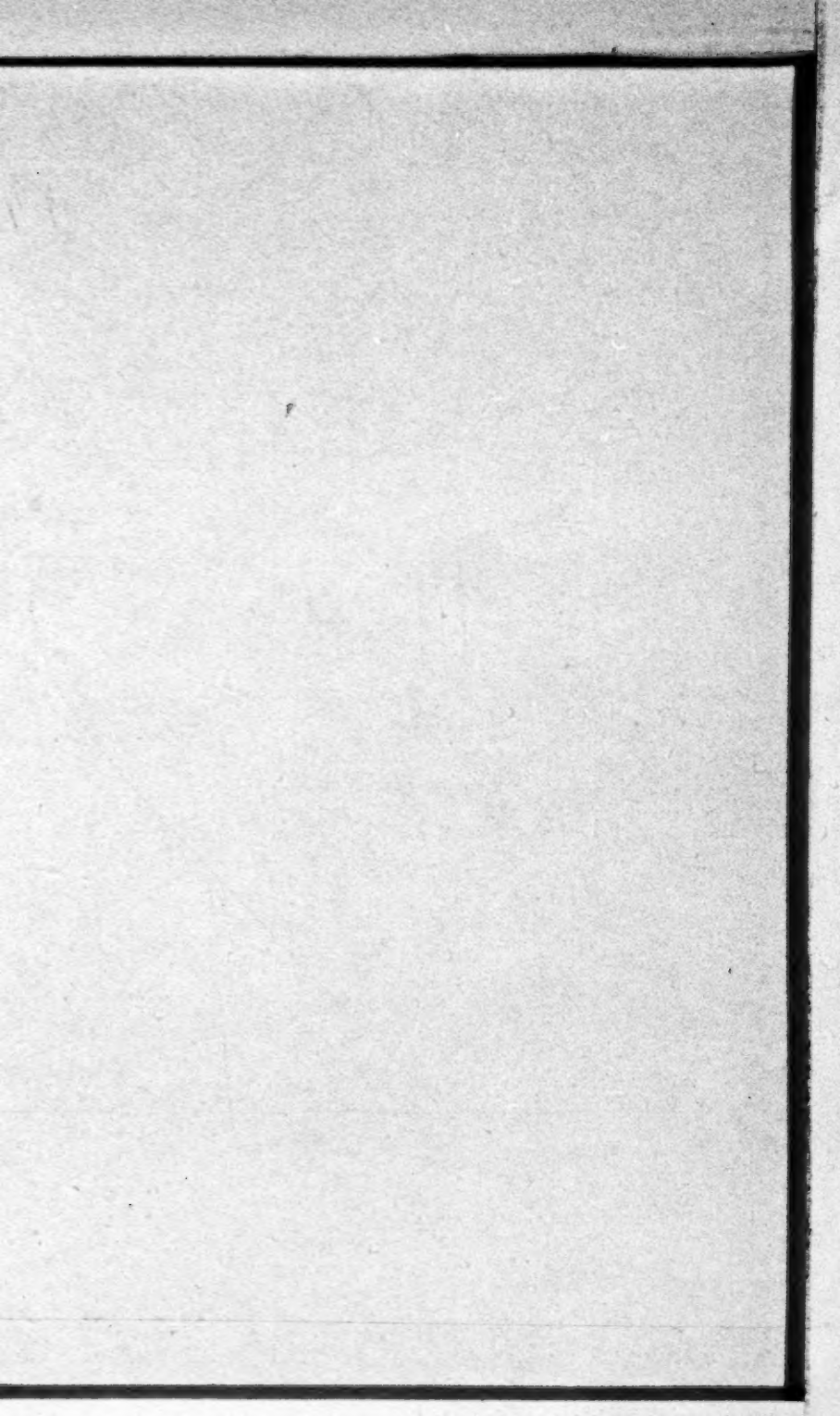
character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Section 527 of the California Code of Civil Procedure provides in pertinent part as follows:

* * *

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 [1] days or, if good cause appears to the court, 20 days [2] from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order

must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desires it, to enable him to meet the application for the preliminary injunction. . . .



Supreme Court, U. S.

FILED

In the Supreme Court of the 20 1973

United States

MICHAEL DOBAK, JR., CL

OCTOBER TERM, 1972

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation,
SUNSHINE BISCUITS, INC., a corporation, and
STANDARD BRANDS, INC., a corporation,
Petitioners,

vs.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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GRANNY GOOSE FOODS, INC., a corporation,
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On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 472 F.2d 764. The order of the Court of Appeals rejecting the suggestion of petition for a rehearing en banc and denying the petition for rehearing is reprinted in the appendix to the

Petition at p. xii. The oral opinion of the District Court and the adjudication in criminal contempt is unreported, and is reprinted in the appendix to the Petition at pp. xiv-xxi.

JURISDICTION

The Opinion of the Court of Appeals was issued on January 18, 1973. A petition for rehearing was timely filed and denied on February 22, 1973. The petition for a writ of certiorari was filed May 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether Section 1450 of Title 28 U.S.C., had the effect of continuing in effect indefinitely a temporary restraining order of a state court issued without hearing, following removal of the proceeding to the federal district court, and the subsequent denial by that court of a motion to dissolve the order.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Petition at pages 3-4 and in the Appendix to the Petition, pages xii-xxiv.

STATEMENT

A. The Proceeding in the State Court

On May 15, 1970, petitioners filed a complaint in the Superior Court of the State of California for the County of Alameda alleging that respondent was engaging in a strike in breach of the collective bargaining contract to which petitioners and respondent were parties (R.6-12). Upon the filing of the complaint a temporary restraining order was issued without hearing which enjoined all strike activity (R.30-32). An order to show cause why a preliminary injunction was

simultaneously issued with a return date of May 26, 1970 (*ibid.*).

On May 19, 1970, respondent together with other named defendants removed the state court proceeding to the United States District Court for the Northern District of California on the ground that the action arose under 29 U.S.C. Section 185 (Section 301 of the National Labor Relations Act, as amended). On the previous day, May 18, 1970, unknown at the time of the removal to counsel for respondent, the employers had filed a "First Amended Complaint for Injunction" in the Superior Court (R. 43-50). The amended complaint was substantially identical to the original complaint, but added a party plaintiff and a party defendant (*ibid.*). At the time the amended complaint was filed the Superior Court issued a "Modified Temporary Restraining Order," again without hearing (R.112). The latter order differed from the first restraining order only in respect to its coverage, in view of the added parties in the First Amended Complaint (*ibid.*). A show cause order was issued in connection with the modified restraining order, with a return date of May 26, 1970 (R.113). On May 20, 1970, respondent and the other named defendants in the Superior Court action filed an "Amended Petition for Removal of Civil Action," attaching a copy of the First Amended Complaint, so as to insure the effective removal of the entire proceeding in the Superior Court (40-41). Following the amended petition for removal there have been no further proceedings in the Superior Court which are relevant to the Petition for Certiorari.

B. Proceedings in the Federal District Court Immediately Following Removal

On May 19, 1970, as soon as the state court case had been removed to the court below, respondent and the other named defendants filed a motion to dissolve the temporary restrain-

ing order issued by the state court (R.34-35). An order shortening time was issued, and the motion was noticed for May 22, 1970 (R.35, 62-63). Petitioners also filed a motion to remand the case to the Superior Court, and noticed it for the same day—May 22, 1970 (R.66-68).

The motions to remand and to dissolve were heard together by the court below on May 27, 1973, the delay having been occasioned by the transfer of the case to a different judge than the one originally assigned to the case. The motion to remand was denied in open court at the conclusion of the hearing (See R.123). The motion to dissolve, however, was taken under consideration. A ruling was handed down on June 4, 1970, denying the motion to dissolve on the authority of the Supreme Court's decision issued on June 1, 1970, in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), which in effect overruled *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), upon which the motion relied (R.123). The record does not show any further activity in the District Court with respect to this case until the institution of the contempt proceeding involved in the instant Petition, which we describe below.

C. The Contempt Proceeding in the District Court

On December 1, 1970, petitioners filed a "Motion for Contempt Judgment" alleging that respondent "has failed and refused to comply with the provisions of the Modified Temporary Restraining Order" of May 18, 1970, by instituting strike and picketing activities against petitioners on November 30, 1970 (R. 125, 124-128).

The affidavits attached to the motion allege that on November 9, 1970, respondent sent petitioners telegrams requesting meetings for the purpose of negotiating a collective bargaining agreement (R.129, 132). Petitioners' attorney answered by letter dated November 11, 1970, stating

that it was their position that a contract was presently in effect, and declining to negotiate on that ground (R.130, 133). In a letter dated November 13, 1970, respondent's attorney informed petitioners' attorney that it was the position of the respondent Union that there was no such contract in effect, and also that there was no order in effect which "forbids Local 70 from bargaining with the employer" (R.135). The letter further states that it was also respondent's position that the restraining order issued by the Superior Court on May 18 "has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction" (R.135). The affidavits in support of the contempt motion further allege that picketing and strike activity by the Union was in fact begun on November 30, 1970, and was in effect on December 1 when the motion was filed (R.138-139, 144-145, 147, 152, 154).

The District Court issued an order shortening time for the hearing on the contempt motion, and the matter was heard the morning of the following day, December 2, 1970, (R.161). At the outset of the hearing respondent orally moved to quash the order to show cause on the ground that the temporary restraining order which was alleged as the basis for the contempt action was no longer in effect. The motion was summarily denied. Evidence was thereupon presented to the effect that respondent had instituted picketing on November 30, 1970, in support of its request for bargaining and a contract, and that a work stoppage was then in effect. At the conclusion of petitioners' case, respondent moved for a continuance for the purpose of preparing a defense, counsel for respondent having had opportunity to read the contempt papers for the first time on the morning of the hearing. The motion was denied,

and the District Court forthwith stated its conclusions and issued its order from the bench.

The District Court found respondent guilty of criminal contempt, based upon the picketing and strike activity which began on November 30, 1970. In the District Court's view, these activities were "in open and flagrant defiance of the order of the Court" which had been issued without hearing on May 18, 1970, more than six months previously (Pet.App., p. xx). A fine of \$200,000.00 was imposed against respondent, of which \$150,000.00 was made "conditional on the [respondent's] failure to purge itself within 24 hours of the date and hour of the signing of the Court's order (*ibid.*)."

D. The Decision of the Court of Appeals

The appeal from the District Court raised procedural issues in addition to the question presented by the Petition for Certiorari. The Court of Appeals, with one judge dissenting, concluded that the order which the District Court found respondent to have violated had expired prior to the events upon which the contempt adjudication were based, and accordingly did not pass on the other questions.

In reaching its conclusion, the court below noted that the temporary restraining order would have expired under California law not later than twenty days after issuance (which would have been June 7, 1970), and under Rule 65(b) of the Federal Rules of Civil Procedure could not have remained valid for any longer period had it initially been issued by a federal district court (Pet. App. pp. v-vi). Petitioners' argument that Section 1450 of Title 28 U.S.C. had the effect of continuing indefinitely the validity of the order of May 18, 1970 was rejected by the court below. In providing that state court orders "shall remain in full force and effect until dissolved or modified by the district court",

Section 1450, according to the court below, preserves the terms, scope and duration of the state court order for the identical "life span" which the state court had given it. Since the order could not have survived beyond June 7, 1970, the court below concluded that Section 1450 could not have given effect to the order beyond that date, and that it was therefore not in existence in November and December, 1970, when respondent was alleged to have violated it. In explanation of its conclusion, the court below reasoned (Pet. App. pp. v-vi):

"Section 1450 does not create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court. Section 1450 permits transfer to the federal court of state court restraining orders without any loss of potency during the trip. It adds nothing to the terms of the state orders. The purpose of Section 1450 is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted. [Petitioners'] construction of Section 1450 would offend the policy of California and federal policy imposing strict limitations on the longevity of temporary restraining orders."

ARGUMENT

The decision below is correct and does not warrant review by this Court. The conflict between the circuits which petitioners claim is overstated. None of the statements from the opinions of the courts of appeal relied upon petitioners to show a conflict constitutes a considered determination of the question presented.

1. The plain language of Section 1450 of Title 28 U.S.C. guarantees the continued existence of a state order issued

prior to removal in precisely the same form and substance that it was issued, until and unless expressly dealt with by the federal district court. No inference can be drawn that the language of that provision was intended to alter, prolong or otherwise narrow or expand any such order. Accordingly, the court below properly determined that Section 1450 did not affect the duration of the state court order involved in this case, and that its duration was fixed by the state court and state law.

The temporary restraining order of May 18, 1970 expressly terminated on May 26, 1970, the return date of the show cause order issued in conjunction with it. The court below assumed that the order could have been extended at the most until June 7, 1970, pursuant to Section 527 of the California Code of Civil Procedure, which provides in relevant part as follows (See Pet. App., p. xiii):

"In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order."

It is not, and could not seriously be contended that the court below misread either the restraining order or California law in holding that the May 18, 1970, order expired no later than June 7, 1970. See, *Sharpe v. Brotzman*, 145 C.A.2d 354, 359 (1956); *Lockwood v. Sheedy*, 157 C.A.2d 744, 745 (1958). It follows, as the Court of Appeals held, that Section 1450 of Title 28 U.S.C. maintained the May 18 order in effect not later than June 7, 1970.

This conclusion is in accord with holdings of the courts of appeals in removal cases involving analogous situations

that Section 1450 neither cures defects in nor alters the terms and conditions of state orders. See, e.g., *Dunn v. Cedar Rapids Engineering Co.*, 152 F.2d 733, 734 (C.A. 9, 1946); *Curtis Co. v. Falls, Inc.*, 305 F.2d 811, 814 (C.A. 3, 1962); *Dry Clime Lamp Corp. v. Edwards*, 389 F.2d 590, 595-596 (C.A.5, 1968); *Munsey v. Testworth Laboratories*, 227 F.2d 902 (C.A.6, 1955); cf., *Duncan v. Gegan*, 101 U.S. 810, 812 (1880). The decision below is also fully consistent with, and is required by federal policy dealing with the duration of temporary restraining orders issued without hearing. As noted by the court below, such an order expires by operation of law under Rule 65(b) of the Federal Rules of Civil Procedure ten days after its issuance, and cannot be extended for more than an additional ten days. There is substantial doubt whether Section 1450 could legitimately be read to overcome the impact of Rule 65(b) in view of the established principle that a proceeding is governed by federal law following removal. See *Ex parte Fisk*, 113 U.S. 713; cf. *Freeman v. Bee Machine Co.*, 319 U.S. 448, 452. Whether analyzed under Rule 65(b) or under the state law which controlled its issuance, the order of May 18, 1970 could not have been substantively modified by Section 1450 in such a manner as to give it an effect permitted under neither state nor federal law.

2. Petitioners' contention that the District Court's denial of respondent's motion to dissolve the May 18 order constituted the granting of a preliminary injunction, which then remained in effect during the subsequent events in this case, is without merit (Pet. pp. 16-18). The order of May 18 was in effect by its own terms at the time the motion to dissolve was filed, and the sole issue raised by the motion was whether the Norris-LaGuardia Act deprived the court below of jurisdiction to maintain it in effect in view of the then prevailing rule of *Sinclair Refining Co. v. Atkinson*,

370 U.S. 195. Neither factual, contractual nor equitable grounds were presented for adjudicating the propriety of issuing injunctive relief against the Union. Such issues, of course, would have been appropriate for hearing on an application for a preliminary injunction, but petitioners did not apply, and indeed have never applied for the issuance of a preliminary injunction in the District Court.

The denial of the motion to dissolve thus constituted a ruling only that there was jurisdiction in the District Court to issue, or maintain for the period allowed by law, a temporary restraining order issued without a hearing. The issue of whether a preliminary injunction should be issued was not presented, was not heard, and was not determined. Cf. *Bailey v. Transportation Communication Employees Union*, 45 RFD 444 (N.D. Miss. 1968).

3. This case does not present the kind of conflict among the circuits which would warrant resolution by this Court.

Appalachian Volunteers v. Clark, 432 F.2d 530 (C.A. 6, 1970), which petitioners contend to be irreconcilable with the decision below (Pet. 10), does not support petitioners' position because the state court order involved in that case "had no termination date" (432 F.2d at 532). Accordingly, the holding of the Sixth Circuit that Section 1450 precluded "the automatic termination of the temporary restraining order" has no bearing on the situation where, as in the instant case, the state court order was of limited duration.

In *Morning Telegraph v. Powers*, 450 F.2d 97 (C.A.2, 1972) the Court of Appeals for the Second Circuit observed that a state court temporary restraining order of limited duration "was extended automatically by 28 U.S.C. Section 1450 when removed" (450 F.2d at 98). The quoted statement apparently conflicts with the holding of the court below, but there is no indication in the opinion of the Second Circuit that the issue was raised or fully considered.

The point is in no way central to the decision of the Court. The further assertion of petitioners that *Morning Telegraph v. Powers* also stands for the proposition that the denial of a motion to dissolve a restraining order is the equivalent of the granting of a preliminary injunction may be valid as applied to the facts in that case, but does not show conflict with the decision below. The Second Circuit's opinion shows that the District Court as well as the parties in *Morning Telegraph* treated the hearing on the motion to dissolve the restraining order as a full hearing on application for a preliminary injunction, and the considerations relied on by the District Court were relevant to the granting of a preliminary injunction. For reasons already stated, the same may not be said in the present case, where the motion to dissolve presented only a narrow jurisdictional issue.

General Electric Co. v. Local Union 191, L.U.E., 413 F. 2d 964 (C.A.5, 1969), cited in the Petition (p. 11) as in conflict with the decision below, does not deal with the Section 1450 problem. The only determination of the Fifth Circuit which relates to the instant case is that the motion to dissolve the state court order was there considered to have raised the same issues as an application for a preliminary injunction. As noted above, whether a hearing on a motion to dissolve is the equivalent of a hearing on preliminary injunction turns on the particular circumstances of the hearing in each case. Both the rulings of the Fifth Circuit in *General Electric* and the court below in this case may well be correct on this point in the light of the respective records in the two cases.

The two federal district court decisions cited in the Petition (pp. 11-12) (*Peabody Coal Co. v. Barnes*, 308 F. Supp. 902 (E.D. Mo., 1969), and the *Herald Co. v. Hopkins*, 325 F. Supp. 1232 (E.D.N.Y., 1971)) contain dicta that Section 1450

converts a state court order of limited duration into an order of indefinite duration. Again, however, the issue was apparently neither raised, briefed nor considered in either case, and the dicta does not constitute a considered judgment on the matter.

The decision of the court below is the only fully considered determination by a court of appeals as to the effect which Section 1450 has on a state court temporary restraining order of limited duration, and issued without hearing. There is no conflict with that decision of the kind which would warrant the granting of the Petition.

4. For two reasons, it is doubtful whether the question presented is of substantial importance in the administration of the removal provisions of Title 28 of the United States Code. First, the holding of this Court in 1962 in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), that federal district courts were without jurisdiction to enjoin union strikes in breach of contract brought about substantial activity in the removal of such cases from state courts. With the overruling of *Sinclair* by *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), the reason for that activity disappeared. It is not likely that the kind of problem involving state court temporary restraining orders in labor cases which is exemplified in the present case will be a recurring one.

Second, as a practical matter, it is simple for complainants who obtain temporary restraining orders to avoid the problem in this case. A motion for preliminary injunction may be filed at any time after removal in a case of this kind, and the matter brought on for orderly hearing and determination. There is no explanation in the record in the present case for petitioners' failure to follow that reasonable course. If, as petitioners assert, there is doubt in the minds of litigants about the effect of Section 1450 on state court orders issued without a hearing, it is a problem which can be easily resolved through routine procedures which would in any event be followed in the absence of removal.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: August, 1973.

BRUNDAGE, NEYHART, GRODIN &
BEESON
DUANE B. BEESON
VICTOR VAN BOURG

100 Bush Street
San Francisco, Calif. 94104
Telephone: (415) 986-4060 .

Attorneys for Respondent

APPENDIX

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation, SUNSHINE
BISCUITS, INC., a corporation, and STANDARD
BRANDS, INC., a corporation,
Petitioners,

vs.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed May 22, 1973
Certiorari Granted October 9, 1973

APPENDIX

In the Supreme Court

OF THE

United States

(Circuit Court for the District of Columbia)

No. 13-1886

GRANT (JOHN EDWARD), a corporation, Plaintiff,

vs.

WILLIAMS (JAMES HENRY), a corporation, Defendant.

Plaintiff,

vs.

BROTHERHOOD OF TEAMSTERS & ALLEYS TRUCK DRIVERS

LOCAL 10 OF ALABAMA COUNTY, INTERNATIONAL

BROTHERHOOD OF TEAMSTERS (AMERICAN)

WASHINGTON & DISTRICT OF COLUMBIA

Defendant.

On writ of Habeas Corpus to the United States

Court of Appeals for the District of Columbia

Entered for docketing March 22, 1917

Before the Circuit Court for the District of Columbia

Document
Docket
First
Temporary
Modification
Cause
Petition
Amendment
Bond
Notice
Points
Injury
Affidavit
Short
Order
Notice
Notice
Motion
Memorandum
to Report
Injury
Affidavit
Remarks
Affidavit
Short
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Order
Restriction
Motion
Affidavit
Affidavit
Affidavit

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CIVIL DOCKET
UNITED STATES DISTRICT COURT
C-70 1057 AJZ

**Granny Goose Foods, Inc. & Sunshine
Biscuits, Inc.**

vs.

**Brotherhood of Teamsters & Auto
Truck Drivers, Local No. 70 of Ala-
meda County et al**

**Attorneys for plaintiff: Littler, Mendelson & Fas-
tiff, 593 Market St., SF**

**Attorneys for defendant: Brundage, Neyhart, Gro-
din, Beeson, 100 Bush St., SF; Victor VanBourg,
45 Polk St., SF**

STATISTICAL RECORD

J. S. 5 mailed: 5-19-70

(Costs-Clerk) (Date: 5-19-70)

(Name or Receipt No.: 75707)

(Rec. 15.00)

(Date: May 22, 1970)

(Name or Receipt No: CDI-93)

(Disb.: 15.00)

(Date: 12-3-70)

(Name or Receipt No.: (office) 8CO51.

(Rec.: 5.00)

J.S. 6 mailed

(Costs-Marshal) (Date: Dec. 4, 1970)

(Name or Receipt No.: CD1-44)

(Disb.: 5.00)

Basis of Action: Labor Relations,

Natl. Labor Relations Act 29

U.S.C. 151

(Costs: Docket fee)

(Costs: Witness fees)

Action arose at:

(Costs: Depositions)

C-70 1057 AJZ

Granny Goose Foods et al vs Brotherhood
of Teamsters et al

Proceedings

Date

1970

May 19:

1. Filed petn for removal from Superior Court, State of Calif., County of Alameda, their #400637, summons, complaint, TRO & OSC.
2. Filed defts notice of removal.
3. Filed defts notice of mo to dissolve inj.
4. Filed defts affidavit in support of appli for Ord shortening time.
5. Filed defts removal bond in sum of \$250.00.

May 20:

6. Filed defts amended petn for removal.
7. Filed ORD shortening time for hrg of mo to dissolve TRO, 5-22-70. 9:30 A.M. (Levin)

May 22:

8. Filed defts notice of related cases, 70-883.
9. Filed pltfs notice of mo & mo to remand action to Superior Court State of Calif., County of Alameda.
10. Filed pltfs affidavit in support of appli. for ord shortening time.

11. Filed ORD shortening time to 5-22-70, 9:30 AM for hrg of mo to remand. (Levin)
ORD reassigned to Judge Zirpoli. (Levin)

May 26:

12. Filed pltfs suppl affidavit of George J. Tichy.
- 12A. Filed reassignment ord assigning action to Judge Zirpoli. (Harris)

May 27:

13. Filed pltfs declaration of Byron T. Hawkins.
14. Filed pltfs affidavit of Willis B. Court.
15. Filed Acknowledgmt of SVC by Kenneth N. Silbert
16. Filed Acknowledgmt of SVC by Victor J. Van Bourg

Jun. 4

17. Filed ORDER denying Mo to Dissolve State Court TRO (Zirpoli)

Dec. 1:

- 17-a. Filed Pltfs Motion for Contempt Judgement with Affidavits.
18. Filed ORDER shortening time to 10:30 A.M., 12/2/70 (Zirpoli)

Dec. 2:**

- 18-a. Entered JUDGEMENT & ORDER of Criminal Contempt as to Defts (Zirpoli)

Dec. 3:

19. Filed Notice of Appeal.

Dec. 4:

20. Filed Affidavit of Richard Sarmento re compliance with contempt Ord.

Dec. 2:**

ORDERED aft hrg-Judgment and Order of Criminal Cintempt as to Defts (Zirpoli)

21. Filed memo of Points and Auths in Suppt of Order of Contempt.

Dec. 3:

22. Filed ORDER CCA staying payment of fine imposed upon appellant by Dist Court pending appeal. (Hamlin)

Dec. 7:

23. Filed defts bond in amount of \$50,000.00.

Dec. 8:

24. Filed ORDER approving bond. (Zirpoli)

Dec. 28:

Made, Mailed Record on Appeal CCA

Littler, Mendelson & Fastiff
 593 Market Street
 San Francisco, California 94105
 (415) 433 1940

Attorneys for Plaintiffs

Superior Court of the State of California
 For the County of Alameda

No. 400637

Granny Goose Foods, Inc., a corporation; Sunshine Biscuits,
 Inc., a corporation; Standard Brands, Inc., a corporation,
 Plaintiffs,

vs.

Brotherhood of Teamsters & Auto Truck Drivers, Local
 No. 70 of Alameda County, International Brotherhood of
 Teamsters, Warehousemen & Helpers of America, an un-
 incorporated association; Western Conference of Teamsters,
 International Brotherhood of Teamsters, Chauffeurs, Ware-
 housemen & Helpers of America, an unincorporated asso-
 ciation; Robert Laird; James Muniz; Joseph Arenio; Louis
 Riga; Charles Mack; Lawrence Diaz; Edward Painter; Alex
 Ybarraloza; Leroy Nunes; Stanley Botello; Ronald Rocha;
 Art Soto; Jack Sweeny; Richard S. Durassette; Robert
 Windsor; Al Leishman; Richard Saramento; First Doe
 Association to Fifth Doe Association, inclusive; First Doe
 to One Hundredth Doe, inclusive,

Defendants.

[Filed May 18, 1970]

FIRST AMENDED COMPLAINT
 FOR INJUNCTION

Plaintiffs complain of defendants, and each of them,
 and for its first cause of action, alleges as follows:

First Cause of Action

I

Plaintiff Granny Goose Foods, Inc. is a corporation existing under and by virtue of the laws of the State of California. Plaintiff Granny Goose Foods, Inc. is engaged in the manufacture and distribution of various food products in Alameda County and the State of California.

II

Plaintiff Sunshine Biscuits, Inc., is a corporation existing under and by virtue of the laws of the State of Delaware. Plaintiff Sunshine Biscuits, Inc., is authorized to do business in the State of California, and is engaged in the manufacture and distribution of various food products in Alameda County and the State of California.

III

Plaintiff Standard Brands, Inc., is a corporation existing under and by virtue of the laws of the State of Delaware. Plaintiff Standard Brands, Inc., is authorized to do business in the State of California and is engaged in the manufacture and distribution of various food products in Alameda County and the State of California.

IV

Defendant Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is an unincorporated association commonly known as a labor union.

Defendant Western Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is an unincorporated association commonly known as a labor union.

Defendants Robert Laird, James Muniz, Joseph Areno, Louis Riga, Charles Mack, Lawrence Diaz, Edward Painter, Alex Ybarraloza, Leroy Nunes, Stanley Botello, Ronald Rocha, Art Soto, Jack Sweeny, Richard S. Durassette, Robert Windsor, Al Leishman and Richard Saramento are officers and/or agents of the other defendants.

V

Defendants First Doe Association to Fifth Doe Association, inclusive, and First Doe to One Hundredth Doe, inclusive, are sued herein under their fictitious names, their true names and capacities, whether corporations, association, or individuals being unknown to plaintiffs, and at such time as the correct names and capacities of said defendants have been ascertained, plaintiffs will ask leave of court to amend this Complaint accordingly.

VI

At all times material herein, plaintiffs have been, and now are, parties to collective bargaining agreements entitled "National Master Freight Agreement", hereinafter called "Master Agreement", and "Local 70 Pick-Up and Delivery Supplemental Agreement", hereinafter called "Local 70 Agreement". Such agreements contained the general terms and conditions of

employment for defendants' members who are employees of plaintiffs.

VII

The portions of said agreements which are material to this cause of action are Articles 7, 8 and 37 of the Master Agreement, and Articles 42 and 61 of the Local 70 Agreement. True and correct copies of said articles are attached hereto as Exhibit "A" and incorporated by reference as though fully set forth herein.

Article 61 of the Local 70 Agreement provides that the term of each such agreement is "subject to and controlled by all the provisions of Article 37," of the Master Agreement. Article 37 of the Master Agreement provides for the negotiation of changes and revisions in said agreement where there is no cancellation or termination of said agreement. Said article further provides that the only circumstances under which defendants are permitted to engage in economic recourse is "to support their requests for revisions if the parties fail to agree thereon."

VIII

Articles 7 and 8 of the Master Agreement and Article 42 of the Local 70 Agreement provide compulsory grievance procedures for the resolution of disputes which arise between plaintiffs and defendants. Those articles require that grievances or controversies between the parties are subject to said compulsory grievance procedures. Article 42 of the Local 70

Agreement specifically provides and requires that there be no strikes by defendants until all possible means of settlement provided for in the grievance procedures have been exhausted.

IX

On or about November 24, 1969, plaintiffs received a written letter from the National Freight Industry Negotiating Committee of the International Brotherhood of Teamsters, hereinafter called the "Committee". Said letter notified plaintiffs that the Committee was the bargaining agent for defendants and that on behalf of defendants the Committee desired "to negotiate changes and revisions in the terms and conditions of the Master Agreement and all supplements thereto . . . as provided in Article 37 thereof."

X

After November 24, 1969, and ending on April 2, 1970, the Committee and representatives of plaintiffs engaged in collective bargaining negotiations with regard to changes and revisions in the Master Agreement and the Local Supplements. On April 2, 1970, the representatives of defendants and plaintiffs reached agreement on proposed changes and revisions of said agreements, subject to ratification by Teamsters Unions throughout the nation. Said agreement has never been rejected by the Teamsters Unions throughout the nation nor has any impasse or deadlock on collective bargaining issues been declared by the bargaining representatives of defendants and plaintiff.

XI

Since on or about May 14, 1970, and continuing through the date hereof, defendants have caused the facilities of Granny Goose Foods, Inc. and Sunshine Biscuits, Inc. within the County of Alameda to be picketed and caused said plaintiffs' employees to stop work and since on or about May 18, 1970, and continuing through the date hereof, defendants have caused the facility of Standard Brands, Inc. within the County of Alameda to be picketed and caused its employees to stop work. Said work stoppage was directed, induced and encouraged by the officers, agents and representatives of defendants. Plaintiffs have been informed and believe that said work stoppage will continue unless judicial relief is obtained.

XII

Plaintiffs have at all times performed fully and faithfully and have followed each and every act required of plaintiffs to be performed under said agreements.

XIII

By the actions and conduct alleged herein, defendants breached the Master Agreement and the Local 70 Agreement between plaintiffs and defendants, and, in particular, the grievance provision thereof.

XIV

By reason of the aforesaid activity in breach of the agreements, plaintiffs have been and are being prevented from conducting their normal business activity

as manufacturers and distributors of food products. Plaintiffs have already suffered and will continue to suffer great and irreparable damage by reason of defendants' actions in that plaintiffs are and will be unable to service their customers and will lose their business.

XV

Defendants have threatened to and will, unless restrained and enjoined by this Court, continue said work stoppage. Plaintiffs have no plain, speedy or adequate remedy at law, and unless the defendants are immediately restrained from continuing their unlawful actions, plaintiffs will sustain great and irreparable injury and damage as hereinabove alleged. Plaintiffs' business as manufacturers and distributors of food products is one which requires reliability and continuity of service; any disruption of such service will cause irreparable injury to plaintiffs. Furthermore, because of the inability of plaintiffs to service their customers, the good will of each plaintiff has been damaged and will continue to be damaged as long as said unlawful acts continue.

Second Cause of Action

Plaintiffs complain of defendants, and each of them, and for a second cause of action allege as follows:

I

The allegations as contained in paragraphs I through XV of the First Cause of Action are incor-

porated herein by reference as though fully set forth herein.

II

Defendants, by their actions alleged herein, proximately caused damage to plaintiffs in an amount not less than Four Hundred Thousand Dollars (\$400,000.00) per day since May 14, 1970. Plaintiffs believe that such damages will continue for each day that defendants continue to engage in said illegal work stoppage. Plaintiffs presently request Eight Hundred Thousand Dollars (\$800,000.00) in actual damages on their behalf with the hope, however, that such damages do not reach this figure and that the work stoppage is promptly terminated. Plaintiffs request leave to amend the Complaint to show actual damages after they have been determined.

Wherefore, plaintiffs pray judgment against defendants, and each of them, as follows:

1. That the officers, agents, representatives, employees and members of defendants, and each and every and all other persons acting at the direction of or in concert with defendants be permanently enjoined and restrained from engaging in any of the following activities:

- (a) Directing or ordering, or otherwise inducing, employees of plaintiffs not to perform work for plaintiffs.

- (b) Picketing at any facilities of plaintiffs within the State of California where the effect of

such picketing is to induce, encourage or cause employees of plaintiffs not to work for plaintiffs.

(c) Engaging in any activity for the purpose of causing, or with the effect of causing, a stoppage of work for, or strike against plaintiffs.

(d) Failing to withdraw any orders or directions to employees of plaintiffs that said employees should engage in a cessation of work for plaintiffs or otherwise engage in any strike or stoppage of work.

2. That this Court make an Order directing defendants herein, and each of them, to show cause at a time and place appointed in said Order why the defendants, and each of them, and all others referred to in paragraph 1 of this prayer should not be enjoined and restrained during the pendency of this action from doing any of the things hereinabove mentioned in paragraph 1 of this prayer.

3. That a Temporary Restraining Order be granted to plaintiffs, enjoining and restraining defendants, and each of them, and all others referred to in paragraph 1 of this prayer from doing any of the things and acts hereinabove mentioned in paragraph 1 of this prayer pending the hearing of said Order to Show Cause.

4. That upon the hearing of said Order to Show Cause a Preliminary Injunction be granted herein, enjoining and restraining defendants, and each of them, and all others referred to in paragraph 1 of this prayer during the pendency of this action.

5. That plaintiffs be granted damages in the amount of Eight Hundred Thousand Dollars (\$800,000.00).

6. That plaintiffs be allowed their costs of suit herein incurred.

Dated: May 18, 1970.

Littler, Mendelson & Fastiff

By: /s/ Wesley J. Fastiff
Wesley J. Fastiff

By: /s/ George J. Tichy, II
George J. Tichy, II

By: /s/ Robert M. Lieber
Robert M. Lieber

Attorneys for Plaintiffs

[Title omitted in printing]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Upon reading the verified complaint on file in this action and the supporting declarations and the points and authorities filed herewith, and it appearing to the satisfaction of the Court therefrom that this is a proper case for granting a Temporary Restraining Order and an Order to Show Cause, and that unless a Temporary Restraining Order is granted as prayed for, plaintiffs will suffer great and irreparable injury before the matter can be heard on notice;

Now, Therefore:

It Is Hereby Ordered that the above-named individual defendants and Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, are, and each of them is, ordered to appear before this Court at the Court House in Oakland, California, in the courtroom of the Presiding Judge, at 2:00 o'clock P.M. on the 26th day of May, 1970, then and there to show cause, if any they have, why they and their officers, agents, representatives, employees and members and each and every and all other persons acting at the direction of or in concert with said defendants, should not be enjoined and restrained from engaging in any of the following activities during the pendency of this action or until further order of this Court:

(a) Directing or ordering or otherwise inducing, the employees of the plaintiffs not to perform work for any of said companies;

(b) Picketing at any facility or situs of equipment of the plaintiffs where the effect of such picketing is to induce, encourage or cause company employees not to work for plaintiffs;

(c) Engaging in any activity for the purpose of causing, or with the effect of causing, a stoppage of work, or strike against plaintiffs;

(d) Failing to withdraw any orders or directions to employees of plaintiffs that said employees should engage in a cessation of work for such companies.

(e) Wilful disobedience of paragraphs (a) through (d) above on the part of any person shall be deemed a violation of Section 166.4 of the California Penal Code, and the appropriate law enforcement officials are authorized and requested to take such action as may appear necessary in order to insure full and complete obedience and compliance of paragraphs (a) through (d) of this Order.

It Is Further Ordered that pending the hearing of this Order to Show Cause, the above-named individual defendants and Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and each of them, and their officers, agents, representatives, employees and members, and each and every and all other persons acting at the direction of or in concert with said defendants be and they hereby are restrained and enjoined from doing any of the acts or things hereinabove set forth in paragraphs (a) through (d) hereof.

It Is Further Ordered that plaintiffs furnish a surety bond in the penal sum of \$20,000.

Dated: May 15, 1970.

/s/ Lewis E. Lercara

Judge of the Superior Court

[Title omitted in printing]

[Filed May 18, 1970]

**MODIFIED TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW CAUSE**

Upon reading the verified First Amended Complaint on file in this action and the supporting declarations and the points and authorities filed herewith, and it appearing to the satisfaction of the Court therefrom that this is a proper case for granting a Temporary Restraining Order and an Order to Show Cause, and that unless a Temporary Restraining Order is granted as prayed for, plaintiffs will suffer great and irreparable injury before the matter can be heard on notice;

Now, Therefore:

It Is Hereby Ordered that the above-named individual defendants and Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, are, and each of them is, ordered to appear before this Court at the Court House in Oakland, California, in the courtroom of the Presiding Judge, at 2:00 o'clock P.M. on the 26th day of May, 1970, then and there to show cause, if any they have, why they and their officers, agents, representatives, employees and members and each and every and all other persons acting at the direction of or in concert with said defendants, should not be enjoined and restrained from engaging in any of the following activities during the pendency of this action or until further order of this Court:

(a) Directing or ordering or otherwise inducing, the employees of the plaintiffs not to perform work for any of said companies;

(b) Picketing at any facility or situs of equipment of the plaintiffs where the effect of such picketing is to induce, encourage or cause company employees not to work for plaintiffs;

(c) Engaging in any activity for the purpose of causing or with the effect of causing, a stoppage of work for, or strike against plaintiffs;

(d) Failing to withdraw any orders or directions to employees of plaintiffs that said employees should engage in a cessation of work for such companies.

It Is Further Ordered that pending the hearing of this Order to Show Cause, the above-named defendants and Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and each of them, and their officers, agents, representatives, employees and members, and each and every and all other persons acting at the direction of or in concert with said defendants, be and they hereby are restrained and enjoined from doing any of the acts or things hereinabove set forth in paragraphs (a) through (d) hereof.

Wilful disobedience of paragraphs (a) through (d) above on the part of any person shall be deemed a violation of Section 166.4 of the California Penal Code, and the appropriate law enforcement officials

are authorized to take such action as may appear necessary in order to insure full and complete obedience and compliance of paragraphs (a) through (d) of this Order.

It Is Further Ordered that plaintiffs furnish a surety bond in the penal sum of \$20,000.00.

Dated: May 18, 1970.

/s/ Lewis E. Lercara
Judge of the Superior Court

Kenneth N. Silbert
 Brundage, Neyhart, Grodin & Beeson
 100 Bush Street, Suite 2600
 San Francisco, California 94104
 Telephone: 986-4060
 Attorneys for Defendants

United States District Court
 Northern District of California

No. C-70 1057 GSL

Granny Goose Foods, Inc., a corporation; and Sunshine Biscuits, Inc., a corporation,

Plaintiffs,

vs.

Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association; Western Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association; Robert Laird; James Muniz; Joseph Arenos; Louis Riga; Charles Mack; Lawrence Diaz; Edward Painter; Alex Ybarraloz; Leroy Nunes; Stanley Botello; Ronald Rocha; Art Soto; Jack Sweeny; Richard S. Durasette; Robert Windsor; Al Leishman; First Doe Association to Fifth Doe Association, inclusive; First Doe to One Hundredth Doe, inclusive,

Defendants.

[Filed May 10, 1970]

PETITION FOR REMOVAL OF CIVIL ACTION

Brotherhood of Teamsters & Auto Truck Drivers,
 Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen &

Helpers of America, an unincorporated association; Western Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association, Robert Laird, James Muniz; Joseph Arenó; Louis Riga; Charles Mack; Lawrence Diaz; Edward Painter; Alex Ybarraloza; Leroy Nunes; Stanley Botello; Ronald Rocha; Art Soto; Jack Sweeny; Richard S. Durassette; Robert Windsor; Al Leishman, as and for their petition for removal of the above-entitled action from the Superior Court of the State of California in and for the County of Alameda, in which it is numbered 400637, to the United States District Court for the Northern District of California, show and allege as follows:

I.

Petitioners are defendants who have been served in the civil action commenced on or about May 15, 1970, in the Superior Court of the State of California, in and for the County of Alameda No. 400637 captioned as follows:

Granny Goose Food, Inc., a corporation; and
Sunshine Biscuits, Inc., a corporation,
Plaintiffs,

vs.

Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association; Western Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association; Robert Laird; James Muniz; Joseph Areno; Louis Riga; Charles Mack; Lawrence Diaz; Edward Painter; Alex Ybarraloz; Leroy Nunes; Stanley Botello; Ronald Rocha; Art Soto; Jack Sweeny; Richard S. Durassette; Robert Windsor; Al Leishman; First Doe Association to Fifth Doe Association, inclusive; First Doe to One Hundredth Doe, inclusive,

Defendants.

II.

Service of summons, complaint, order to show cause and temporary restraining order was made on defendants, who are petitioners herein, on May 15, 1970.

Said complaint is the initial pleading setting forth the claim upon which the action is based, and defendants first received a copy of said initial pleading in the manner aforesaid on May 15, 1970.

III.

The following constitute all of the process, pleadings and orders served upon defendants in said action: Summons, Complaint, Temporary Restraining Order and Order to Show Cause, and true copies of which are attached hereto as Exhibits A, B, and C, respectively, and are made a part of this petition.

IV.

The action filed in the Superior Court, as aforesaid, is a civil action of which this Court has original jurisdiction under Section 301 of the National Labor Relations Act, as amended (29 U.S.C. Section 185). More particularly, the complaint alleges in substance that petitioners have violated a collective bargaining agreement by engaging in a work stoppage and picketing against plaintiffs, which are employees engaged in the production and distribution to retail outlets of various baked goods. The business operations of plaintiffs, and each of them, affect interstate commerce within the meaning of Title 29, U.S.C. Section 185 and within the meaning of the National Labor Relations Act, as amended (29 U.S.C. Secs. 151 et seq.). Petitioners Brotherhood of Teamsters & Auto Truck Drivers, Local 70 and Western Conference of Teamsters, are labor organizations which represent employees in industries affecting commerce within the

meaning of Section 2(5) and (7) of the National Labor Relations Act, as amended (29 U.S.C., 152(5) and (7).) The operations of said petitioners also affect interstate commerce within the meaning of Title 29 U.S.C. Sec. 185 and within the meaning of the National Labor Relations Act, as amended (29 U.S.C. Secs. 151 et seq.). Defendants are entitled to remove this proceeding to this Court under Title 28 U.S.C. Section 1441.

V.

Defendants file herewith a bond with good and sufficient surety conditioned that defendants will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the action was not removable or was improperly removed.

Wherefore, defendants pray that the above action now pending against it in the Superior Court of the State of California in and for the County of Alameda, No. 400637 hereby be removed from said state court to this Court, and that this Court assume jurisdiction thereof for all purposes.

Date: May 19, 1970

Brundage, Neyhart, Grodin & Beeson

By: /s/ Kenneth N. Silbert

Verification

I, Kenneth N. Silbert, declare:

I am the attorney for defendants herein; my office is in the City and County of San Francisco; defend-

ants are absent from said City and County and for that reason I make this verification.

I have read the foregoing Petition for Removal and know the contents thereof; the same is true of my own knowledge, except as to the matters which are stated therein on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, on May 19, 1970.

/s/ Kenneth N. Silbert
Kenneth N. Silbert

[Title omitted in printing]

[Filed May 20, 1970]

AMENDED PETITION FOR REMOVAL OF CIVIL ACTION

Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association, Western Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association; Robert Laird; James Muniz; Joseph Arenos; Louis Riga; Charles Mack; Lawrence Diaz; Edward Painter; Alex Ybarralozza; Leroy Nunes; Stanley Botello; Ronald Rocha; Art Soto; Jack Sweeny; Richard S. Durassette; Robert Windsor; Al

Leishman; Dick Saramento, hereby file this Amended Petition for Removal, alleging as follows:

I.

Petitioners adopt each and every allegation contained in the Petition for Removal and hereby include said allegations in this amended petition.

II.

On May 18, 1970, the complaint filed in the Superior Court for the State of California in and for the County of Alameda, No. 400637 was amended by plaintiffs to include the name of an additional plaintiff, Standard Brands, Inc., and the name of an additional defendant, Dick Saramento.

III.

Said amended complaint was served on petitioners who are named as defendants therein on or about May 18, 1970.

IV.

The Petition for Removal herein was filed with the court prior to the time that counsel for petitioners had notice of the filing of the amended complaint in the state court. For that reason the amended complaint was not attached to the petition herein as an exhibit. Said amended complaint is attached hereto as Exhibit A.

Wherefore, defendants pray that the above action now pending against them in the Superior Court of the State of California in and for the County of Ala-

meda, No. 400637 as amended be removed from said state court to this Court, and this Court assume jurisdiction thereof for all purposes.

Date: May 20, 1970.

Brundage, Neyhart, Grodin & Beeson

By Kenneth N. Silbert

Kenneth N. Silbert

Verification

I, Kenneth N. Silbert, declare:

I am the attorney for defendants herein; my office is in the City and County of San Francisco; defendants are absent from said City and County and for that reason I make this verification.

I have read the foregoing Amended Petition for Removal and know the contents thereof; the same is true of my own knowledge, except as to the matters which are stated therein on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, on May 20, 1970.

/s/ Kenneth N. Silbert
Kenneth N. Silbert

(Letterhead of Northwestern National
Insurance Company of Milwaukee, Wisconsin
Stock Company . Organized 1869)

In the District Court of the United States for the
Northern District of California

C-70 1057GSL

Granny Goose Foods, Inc., et al.,
Plaintiffs

vs.

Brotherhood of Teamsters and Auto Truck
Drivers, Local 70, et al.,
Defendants.

[Filed May 19, 1970]

BOND ON REMOVAL

Know All Men by These Presents:

That we, Brotherhood of Teamsters and Auto Truck Drivers, Local 70, et al., Defendants as Principal(s), and the Northwestern National Insurance Company of Milwaukee, Wisconsin a corporation organized under the laws of the State of Wisconsin and authorized to do a general surety business in the State of California, as Surety, are held and firmly bound unto Granny Goose Foods, Inc., et al, Plaintiff(s) above named, in the sum of Two Hundred Fifty and No/100 (\$250.00)

Dollars, lawful money of the United States of America, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, successors and assigns, jointly and severally by these presents.

Whereas, the Principal(s) has (have) filed, or is about to file, a petition in the above entitled Court for the removal of a certain cause therein pending as above entitled.

Now, Therefore, the Condition of This Obligation Is Such, That if the Principal(s) shall pay all costs and disbursements incurred by Plaintiff(s) should it be determined the cause is not removable or is improperly removed, then this obligation shall be void, otherwise to remain in full force and effect.

Signed, sealed and dated at San Francisco, California, this 19th day of May, 1970.

Bond No. S-662815

Northwestern National Insurance Company
of Milwaukee, Wisconsin

By /s/ M. Danks

M. Danks Attorney-in-Fact

The premium charge for this bond is \$10.00 for the term.

[Title omitted in printing]

[Filed May 19, 1970]

**NOTICE AND MOTION
TO DISSOLVE INJUNCTION**

Defendants Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association; Western Conference of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association; Robert Laird; James Muniz; Joseph Areno; Louis Riga; Charles Mack; Lawrence Diaz; Edward Painter; Alex Ybarraloz; Leroy Nunes; Stanley Botello; Ronald Rocha; Art Soto; Jack Sweeny; Richard S. Durasette; Robert Windsor; Al Leishman, in the above-entitled case move for an order dissolving the temporary restraining order heretofore issued herein on the ground that the Court is without jurisdiction to maintain the temporary restraining order in effect under Section 4 of the Norris LaGuardia Act 29 U.S.C. 104.

In support whereof, the aforesaid defendants rely upon the Complaint herein, the Memorandum of Points and Authorities filed in support hereof, and all other papers of record in this proceeding.

Date: May 19, 1970

Brundage, Neyhart, Grodin & Beeson
By: /s/ Kenneth N. Silbert
Kenneth N. Silbert

Notice

To: Granny Goose Foods Inc. and Sunshine Biscuits, Inc., and its attorneys Littler, Mendelson & Fastiff; Wesley J. Fastiff; and George J. Tichy, II.

Please take notice that the above motion to dissolve the injunction in this proceeding will be brought on for hearing at 9:30 a.m. on the 22nd day of May, 1970, or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Gerald S. Levin, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California.

Date:

Brundage, Neyhart, Grodin & Beeson
By: /s/ Kenneth N. Silbert
Kenneth N. Silbert

[Title omitted in printing]

**POINTS AND AUTHORITIES
IN SUPPORT OF MOTION
TO DISSOLVE INJUNCTION**

An injunction issued by a state court against striking and picketing activities by a labor organization and its agents must be dismissed for lack of jurisdiction by a federal court following removal of the proceeding.

Avco Corporation v. Aero Lodge No. 735, 390 USS.
557

Sinclair Refining Co. v. Atkinson, 370 U.S. 195

Date: May 19, 1970

Brundage, Neyhart, Grodin & Beeson

By: /s/ Kenneth N. Silbert

Kenneth N. Silbert

[Title omitted in printing]

[Filed May 19, 1970]

**AFFIDAVIT OF COUNSEL IN SUPPORT OF
APPLICATION FOR ORDER
SHORTENING TIME**

City and County of San Francisco
State of California—ss

Kenneth N. Silbert, being first duly sworn, says as follows:

I am counsel for the Defendants in the above-entitled case, and have represented them at all stages of this proceeding.

The Complaint in this matter was originally filed in the Superior Court for Alameda County, and was based upon an alleged breach of contract by the Defendant Teamster unions and their agents. The relief sought is both injunctive and damages.

On May 15th, a temporary restraining order was issued by the Superior Court, enjoining striking and picketing activity. The temporary restraining order remains in effect at the present time, insofar as shown by the record in this case. On May 19th, 1970, the proceeding was removed to the United States District Court for the Northern District of California.

The dispute giving rise to the picketing and strike herein involves the question of whether the employer-plaintiffs are parties to or bound by the National Master Freight Agreement, and Teamster Local 70 supplement thereto. Negotiations for that contract are currently taking place on a nationwide basis in Washington, D.C. It is the position of the petitioner Teamster Local 70 that the employer-plaintiffs are not bound by the current negotiations. The question of whether or not the employer-plaintiffs are so bound is currently before the National Labor Relations Board in the form of unfair labor practice charges.

It is my legal opinion, based upon clear authority in United States Supreme Court decisions, that the State Court injunction is subject to immediate dissolution by this Court, and that said injunction unlawfully purports to prohibit the defendants from engaging in the conduct which it restrains. In view of the unsettled condition in bargaining negotiations involving Defendant Local 70, it is necessary and

appropriate at the earliest possible moment to resolve the issue as to the validity of the outstanding State Court injunction.

Date: May 19, 1970

/s/ Kenneth N. Silbert,
Kenneth N. Silbert

Sworn and subscribed to before me this 19th day of May, 1970.

[Seal]

/s/ Belle Kendrick,
Notary Public, California

My Commission expires October 29, 1973.

[Title omitted in printing]

[Filed May 20, 1970]

ORDER SHORTENING TIME

This case having come before the Court upon Defendants' application for an order shortening time for hearing upon their motion to dissolve the temporary restraining order in effect against them, and good cause therefor having been shown:

Now Therefore, It Is Ordered that Defendants' application be and hereby is granted, and that said motion shall come on for hearing at 9:30 a.m. on the 22nd day of May, 1970, or as soon thereafter as counsel can be heard in the Courtroom of the Honorable Gerald S. Levin, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California.

Date: May 19, 1970.

/s/ Gerald S. Levin
United States District Judge

Kenneth N. Silbert
 Brundage, Neyhart, Grodin & Beeson
 100 Bush Street, Suite 2600
 San Francisco, California 94104
 Telephone: 986-4060

Victor Van Bourg
 45 Polk Street
 San Francisco, California 94102
 Telephone: 864-4000
 Attorneys for Defendants

United States District Court
 For the Northern District of California

Granny Goose Foods, Inc., et al.,
 Plaintiffs,

vs.

Brotherhood of Teamsters and Auto
 Truck Drivers, Local No. 70, et al.,
 Defendants.

Civil No.
 C-70
 1057 GSL

California Trucking Association, Inc.,
 Plaintiff,

vs.

Brotherhood Of Teamsters & Auto
 Truck Drivers Local No. 70, et al.,
 Defendants.

Civil No.
 C-70
 883 AJZ

[Filed May 22, 1970]

NOTICE OF RELATED CASES

Defendants in the above captioned cases hereby give notice that said cases are related in that they involve similar issues of fact with respect to the existence and effect of certain labor agreements, and involve identical issues of law with respect to the power and obligation of this Court to dissolve certain State Court orders enjoining Defendants from engaging in economic activity in a labor disputes.

Accordingly it is requested that case no. C-70 1057 GSL presently scheduled to be heard by the Honorable Gerald Levin, be transferred to and heard by the Honorable Judge Zirpoli, before whom case no. C-70 883 AJZ is presently scheduled to be heard on May 27, 1970 at 1:00 p.m.

Date: May 22, 1970.

Brundage Neyhart Grodin & Beeson

By /s/ Duane B. Beeson

By /s/ Victor Van Bourg

It Is So Ordered:

Date: May 21, 1970.

/s/ Gerald S. Levin

United States District Judge

Date: May 21, 1970.

/s/ Alfonso J. Zirpoli

United States District Judge

Littler, Mendelson & Fastiff
593 Market Street
San Francisco, California 94105
(415) 433-1940
Attorneys for Plaintiffs

United States District Court
for the Northern District
of California

Civil No. C-70-1057-GSL

Granny Goose Foods, Inc., et al.,
vs. Plaintiffs,

Brotherhood of Teamsters & Auto Truck
Drivers, Local No. 70 of Alameda County,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers of
America, et al.,
Defendants.

[Filed May 22, 1970]

NOTICE OF MOTION TO REMAND

To Defendants above-named and their attorneys
Brundage, Neyhart, Grodin & Beeson, 100 Bush
Street, San Francisco, California:

Please Take Notice that the undersigned will move
this Court at the courtroom of the Honorable Alfonso
J. Zirpoli on the 22nd day of May, 1970, at 9:30 a.m.
of that day, or as soon thereafter as counsel can be
heard, for an Order remanding the above-entitled

action to the Superior Court of the State of California, for the County of Alameda, pursuant to the provisions of Section 1447 of Title 28 of the United States Code, on the ground that the case was removed to this Court improvidently and without jurisdiction because defendants waived their right to removal by submitting to the jurisdiction of said State Court, as is more particularly shown by the Affidavit of George J. Tichy, II, which is provided herewith, and for such other and further relief as may be just, together with costs.

Littler, Mendelson & Fastiff
By /s/ George J. Tichy, II
Attorneys for Plaintiffs

May 21, 1970.

[Title omitted in printing]

MOTION TO REMAND

Plaintiffs move this Court for an Order remanding this cause to the Superior Court of the State of California, in and for the County of Alameda on the ground that the cause was improperly removed and is not within the jurisdiction of this Court in that defendants have waived their right to removal by submitting to the jurisdiction of the state court. Such Motion is based upon the pleadings and proceedings heretofore had herein and upon the Affidavit of George J. Tichy, II and the memorandum in support of Motion to Remand which are filed herewith.

Dated: May 1, 1970.

Littler, Mendelson & Fastiff
By /s/ George J. Tichy, II
Attorneys for Plaintiffs

[Title omitted in printing]

[Filed May 22, 1970]

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND AND IN OPPOSITION TO MOTION TO DIS-
SOLVE INJUNCTION**

I

The plaintiffs herein contend that the cause herein was improperly removed to the federal district court and must be remanded to the state court on the ground that the defendant union, by electing to proceed in the state court on the merits, waived its right of removal.

A. The weight of authority supports the plaintiffs' position. Thus, in *Southwest Truck Body Company v. Collins*, 291 F.Supp. 658 (W.D. Mo. 1968), the court remanded the cause to the state court on the ground that the defendants waived their right to removal by submitting to the jurisdiction of the state court. There, the defendants filed a petition for a writ of prohibition, prohibiting the trial judge from enforcing a temporary injunction issued *ex parte*. The defendants, in addition, filed motions (1) to quash contempt citations for violation of the terms of the injunction and (2) to dissolve the injunction.

The court held that the defendants, by seeking affirmative relief, had "elected their forum" since favorable action by a state court on any of the motions or the petition for prohibition would have resulted in dismissal of the action. Voluntary submission to the state court of issues dispositive of the cause of action precludes a right of removal.

Similarly, in *Vendetti v. Schuster*, 242 F.Supp. 746 (W.D. Pa. 1965), the defendant in a state court trespass action waived his right of removal by submitting his federal question to the state court without reservation. The court quoted *O. G. Orr & Co. v. Fireman's Fund Insurance Company*, 36 F.2d 378 (S.D. N.Y. 1929):

"Having thus on its own initiative submitted itself to the jurisdiction of the state court, and having unsuccessfully tried there an issue, which, if successfully maintained, would have resulted in a dismissal of the action, the defendant elected its own forum; and, having made the election, it cannot thereafter be allowed to remove the case to the federal court The defendant asks a new day in a new court on an issue which has been finally settled. . . . The defendant cannot thus retrieve a lost issue."

In support of its conclusion that litigation of issues in the State court operates to waive the right of removal, the court cited substantial authority, including, *inter alia*, *General Phoenix Corp. v. Malyon*, 88 F.Supp. 502 (S.D. N.Y. 1949), and *Briggs v. Miami Window Corp.*, 158 F.Supp. 229 (M.D. Ga. 1956).

B. It is well established that a federal court is without jurisdiction to consider contempts of a state court order where disobedience of the order occurred prior to the attempted removal of the underlying cause of action to federal court. The only court with jurisdiction to consider such contempts is the state

court and this is particularly so where the contempt proceedings have been initiated prior to removal.

Kirk v. Milwaukee Dust Collector Mfg. Co.,
26 F. 501;

Contempt—Punishment by another court, 99
ALR2d 1100, 1102 (1965).

Where the contempt proceedings have been initiated in state court, the federal court should properly remand the underlying cause of action. The reason is simply that the defendants, by their actions, have taken affirmative steps to create the need for contempt proceedings in state court and have by their disobedience of the court's order placed in issue the propriety and efficacy of that order. Furthermore, it is desirable to have all proceedings in one court. Since the contempt proceedings remain in state court, it is entirely appropriate for the federal court to remand the underlying cause of action to state court. See *Kirk v. Milwaukee Dust Collector Mfg. Co.*, *supra*.

II

As will be developed below, the plaintiffs contend that the federal district court upon removal is not precluded from continuing in effect the state court injunction.

A. The defendant union's reliance on *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962) and *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968), in support of its motion to dissolve a preliminary injunc-

tion issued April 7, 1970, by the Superior Court of the State of California for the County of Alameda is misplaced. In *Sinclair* the employer, in an action brought in a U. S. district court under Section 301 of the Taft-Hartley Act (29 U.S.C. §185), sought injunctive relief against the union's breach of "no-strike" provisions of a collective bargaining agreement between the parties. In affirming dismissal of complaint, the Supreme Court held that a federal court is precluded, by virtue of Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104), from issuing an injunction to restrain a strike over a grievance arising under the terms of a collective bargaining agreement.

In *Avco* the employer filed suit in state court to enjoin the union from striking at its plant. After the state court issued an *ex parte* injunction, the union removed the case to federal district court. The district court, denying a motion to remand to the state court, granted the union's motion to dissolve the injunction issued by the state Court. The Supreme Court held that the state court action was properly removable to a federal district court—even though the Norris-LaGuardia Act, as construed by the court in *Sinclair*, barred the federal court from issuing an injunction.

The Court in *Avco*, however, did not reach the question of the efficacy of a state court injunction after removal. The court explicitly reserved decision on the question whether a federal court upon removal is *required* to dissolve the state court injunction or

whether it has discretion to continue it in effect and enforce it:

"Another question weighed here is whether the district court, to which the action had been removed, should have dissolved the injunction issued by the Tennessee State Court. There is, of course, no question of the *power* of the district court to dissolve the injunction. Whether it did because of *Sinclair* or because of its equity powers or both is not clear. . . . *We reserve decision on those questions.*" (Emphasis added.)

Since the district court in *Avco* had dissolved the state court injunction, the Supreme Court was faced with, and decided, only the narrow question of the *power* of the district court upon removal to dissolve the injunction. Thus, the Union in the instant case, has clearly misconstrued and misapplied the *Avco* and *Sinclair* holdings. Neither case may properly be cited for the proposition that a federal district court upon removal is required to dissolve a previously issued state court injunction. Since the proceedings in *Sinclair* were brought originally in federal court, no question of the effect of removal upon the continued validity of state court injunction was presented. And in *Avco*, since the district court did dissolve the injunction, the Supreme Court had no occasion to resolve the question whether the district court is *required* to dissolve a state court injunction.

B. The Supreme Court recently granted *certiorari* in *Boys Market*, 416 F.2d 368 (9th Cir. 1969), in which the court of appeal concluded that dissolution

of a federal court injunction in a labor dispute was required by *Sinclair*. The Supreme Court would not have agreed to hear this case unless it intended to redefine the scope of *Sinclair*. This conclusion is supported by language in the concurring opinion of Justice Stuart in *Avco*:

"The court expressly reserves decision on the effect of *Sinclair* in the circumstances presented by this case. The court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion."

This language may be read to imply that, notwithstanding *Sinclair*, a federal court may continue in effect a state court injunction without violating Norris-LaGuardia. At the very least, however, the language promises a reconsideration—and not unlikely a reversal—of *Sinclair*. Pending final disposition by the Supreme Court of the question raised by *Boys Market*, federal district courts are not required by any authority to dissolve state court injunctions. The courts are free to decide the question on the basis of policy considerations they find compelling. And it is submitted that injunctive relief is needed to protect the public, to protect legitimate employer interests, and to preserve industrial peace.

C. The dominant objective of Congress in enacting Section 301 of the Taft-Hartley Act was to plug loopholes in the enforcement of collective bargaining agreements. Unions could be sued in federal courts as entities without reference to diversity of citizen-

ship or jurisdictional amount and without taking away "jurisdiction of the state courts." In 1947, Congress was concerned with a statute enacted in 1935 which had radically changed the then existing law of master and servant. The Wagner Act *compelled* employers in interstate commerce to recognize and bargain with labor unions as exclusive bargaining representatives for employees, even though such unions may have been designated by a bare majority of the employees in the appropriate bargaining unit.¹ The employer was required to "bargain in good faith" with such labor organizations as representative for all in the unit. The objective and end product of this compulsion was to be a written and signed collective bargaining agreement setting forth the wages, hours, working conditions and other terms of employment in the bargaining unit for a reasonable period of time. In *Lincoln Mills*, 353 U.S. 448, 453 (1957), the court observed that in enacting Section 301 Congress was "interested in promoting collective bargaining that ended with agreements not to strike" and in 353 U.S. at 454 quoted the Senate Report (page 16), as stating:

"If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer

¹"When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960).

can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract."

To the same effect, a well-known commentator has observed that:

"... About all an employer can get in exchange for his commitments in a collective agreement is continued production—no work stoppages for the life of the agreement. Most employers assume that they don't get even this unless the union signs a no-strike pledge and promises that the union officials will take action against wild-cat strikes and work stoppages. Of course, unions say that employers get a supply of labor in exchange for their concessions in collective agreements. But employers get no more labor now than they did before unions existed. . . ."

Persons with experience in this field are well aware that an injunction, such as that issued by the Superior Court of California in the instant case, is the only "effective" method of assuring freedom from economic warfare for the term of the agreement. It has been aptly said that:

"The discharge of strike leaders does not end the strike; at best, it stops future efforts. A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied busi-

²Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 Wash. U.L.Q. 3, 12.

ness because he cannot deliver. *Equitable relief is not only the most appropriate remedy, but also the only effective one.*" (emphasis added)³

It has also been pointed out that the damage remedy is peculiarly ineffective in a strike situation, because the discipline which makes the strike possible enables the union leaders to insist on dismissal of the damage suit as a condition to ending the strike. In many cases, therefore, the damage remedy is merely a mirage.⁴ In the words of one commentator, damages are "patently a miserable substitute for performance."⁵ The recognition in *International Ass'n of Machinists v. Street* (1961) 367 U.S. 740, 773, that sometimes "[an injunction] alone can effectively guard the plaintiff's right" shows that the Court is well aware of the realities of industrial life considered above. (emphasis added).

Today, therefore, as a practical matter, only a state court, exercising traditional equity jurisdiction, can effectively stop a strike in breach of contract. If the position of the Union is sustained, the end product of the cumbersome and costly compulsory collective bargaining system erected by Congress in 1935, and reaffirmed and reenforced in 1947, will be contracts which contain a cornucopia of benefits for unions and the employees they represent, and a meaningless,

³Stewart, *No-Strike Clauses in the Federal Courts*, 59 Mich. L. Rev. 673, 675 (1961).

⁴Swigert, "Where Labor Unions Get Their Power," U.S. News & World Report, January 31, 1963, at 96, 97.

⁵Rice, *A Paradox of Our National Labor Law*, 34 Marquette L. Rev. 233, 253 (1951). See also, Rice *supra*, at 235, note 15.

practically unenforceable no-strike pledge for employers. Such a reality would expose employers to the possibility of costly disruptive pressures throughout the contract term. The resulting strikes would tend to inflate the cost of goods and services and interrupt their supply. The ultimate consumer would pay the bill. Making contract violation by unions easier than it was in 1947 cannot possibly foster the general welfare, or be in accord with Congressional intent or public policy.

We have seen, then, that the objective of Congress in enacting Section 301 was to insure the enforceability of collective bargaining agreements. As the law has developed, the bare bones of Section 301 have come to life through a series of decisions which made the private arbitration process the preferred instrument of federal labor policy as the *quid pro quo* for the no-strike agreement. Indeed, the arbitration process and effective enforcement of the no-strike agreement have operated in tandem to provide industrial peace and stability and to promote the collective bargaining process which Congress intended when it adopted Section 301. The availability of an effectively enforceable no-strike clause compels Unions to utilize the peaceful machinery of arbitration for the resolution of disputes.

The Union's petition for removal and motion to dissolve are a coldly calculated device to frustrate the equity jurisdiction of the State Court and to undermine the policy of the Federal labor laws. This Court is in a position to mitigate the potential

damage to the collective bargaining relationship by continuing in effect and enforcing the State Court injunction. Only by so doing can the goals of industrial peace, enforceability of collective bargaining agreements, and the fostering of the arbitration process be carried out.

Dated: May 21, 1970

Respectfully submitted,
Littler, Mendelson & Fastiff
By /s/ George J. Tichy, II
Attorneys for Plaintiffs

[Title omitted in printing]

**AFFIDAVIT OF GEORGE J. TICHY, II
IN SUPPORT OF MOTION TO REMAND**

State of California

City & County of San Francisco—ss.

I George J. Tichy, II, being first duly sworn, depose and say as follows:

On May 15, 1970, I notified Kenneth N. Silbert, Esq., attorney for defendants, that I would be seeking a temporary restraining order before the Honorable Lewis E. Lercara, Judge of the Superior Court, at approximately 12:00 noon on that date. I advised Mr. Silbert of the basis on which the relief was sought and advised him of the Alameda County Superior Court practice of having union attorneys present in injunctive proceedings involving labor matters. Copies of the documents were served on Mr.

Silbert shortly before the hearing before Judge Lercara. Both Mr. Silbert and I were present at this hearing and Mr. Silbert presented the viewpoint of the union that there was no breach of contract and that the Court should not grant the temporary restraining order. Despite argument by defendants' counsel, Judge Lercara granted the temporary restraining order.

Thereafter, the temporary restraining order was served on defendants as well as certain of defendant union's members. This is verified by the acknowledgment of service by defendants' counsel on the temporary restraining order and various proofs of service on file in this matter. I am informed and believe that despite knowledge of notice of the contents of the temporary restraining order, various union members and union officials continued picketing activities. As a result, contempt proceedings were initiated in state court against those persons and the union.

Furthermore, I am informed and believe that the picketing has extended to an additional plaintiff, Standard Brands, Inc. Subsequently, a modified temporary restraining order was issued in the superior court on May 18, 1970. Defendants' counsel was advised of this proceeding and presented the defendants' position to the court via telephone. I am further informed and believe that despite knowledge and notice of the modified temporary restraining order, defendant and certain of its members picketed Standard Brands, Inc. in Oakland. Subsequently, on May

19, 1970, contempt proceedings were initiated with regard to the activities at Standard Brands, Inc.

/s/ George J. Tichy, II

Subscribed and sworn to before me this 21st day of May, 1970.

(Seal)

/s/ Lonell F. Chow

Notary Public, California

My Commission expires December 15, 1972.

[Title omitted in printing]

[Filed May 22, 1970]

**AFFIDAVIT OF COUNSEL IN SUPPORT OF
APPLICATION FOR ORDER
SHORTENING TIME**

State of California

City & County of San Francisco—ss.

I, George J. Tichy, II, being first duly sworn, depose and say as follows:

I am the counsel for plaintiffs in the above-entitled matter and have represented them in all stages of this proceeding.

The complaint in this matter was originally filed on May 15, 1970, in the Superior Court for the County of Alameda. In the complaint plaintiffs Granny Goose Foods, Inc. and Sunshine Biscuits, Inc. sought injunctive relief and damages based on a breach of contract by defendant union.

On May 15, 1970, I notified Kenneth Silbert, Esq., attorney for defendants that I would be seeking a temporary restraining order before the Honorable Lewis E. Lercara, Judge of the Superior Court, at approximately 12:00 noon on that date. I advised Mr. Silbert of the basis on which the relief was sought and advised him of the Alameda County Superior Court practice of having union attorneys present in injunctive proceedings involving labor matters. Copies of the documents were served on Mr. Silbert shortly before the hearing before Judge Lercara. Both Mr. Silbert and I were present at this hearing and Mr. Silbert presented the viewpoint of the union that there was no breach of contract and that the court should not grant the temporary restraining order. Despite argument by defendants' counsel, Judge Lercara granted the temporary restraining order.

Thereafter, the temporary restraining order was served on defendants as well as certain of defendant union's members. This is verified by the acknowledgment of service by defendants' counsel of the temporary restraining order and various proofs of service on file in this matter. I am informed and believe that despite knowledge of notice of the contents of the temporary restraining order, various union members and union officials continued picketing activities. As a result, contempt proceedings were initiated in state court against those persons and the union.

Furthermore, I am informed and believe that the picketing has extended to an additional plaintiff,

Standard Brands, Inc. Consequently, a modified temporary restraining order was issued in the Superior Court on May 18, 1970. Defendants' counsel was advised of this proceeding and presented the defendants' position to the court via telephone. I am further informed and believe that despite knowledge and notice of the modified temporary restraining order, defendant and certain of its members picketed Standard Brands, Inc. in Oakland. Subsequently, on May 19, 1970, contempt proceedings were initiated with regard to the activities at Standard Brands, Inc.

It is my legal opinion, based upon the authorities which are submitted in plaintiff's Memorandum of Points and Authorities in Support of Motion to Remand and in Opposition to Motion to Dissolve Injunction, that the federal court should properly remand the underlying cause of action alleged in the complaint to the Superior Court of the State of California, for the County of Alameda. In the event that the Court does remand the matter to state court, it will be unnecessary to consider defendants' Motion to Dissolve the Injunction. It is therefore of major importance that the Motion to Remand be considered prior to or contemporaneously with the defendants' Motion to Dissolve the Injunction.

/s/ George J. Tichy, II

Subscribed and sworn to before me this 21st day of May, 1970.

(Seal)

/s/ Lonell F. Chow

Notary Public, California

My Commission expires December 15, 1972.

[Title omitted in printing]

[Filed May 22, 1970]

ORDER SHORTENING TIME

This case having come before the Court upon plaintiffs' application for an order shortening time for hearing upon their motion to remand and in opposition to motion to dissolve temporary restraining order, and good cause therefor having been shown;

Now, therefore, it is ordered that plaintiffs' application be and hereby is granted, and that said motion shall come on for hearing at 9:30 a.m. on the 22nd day of May, 1970, or as soon thereafter as counsel can be heard in the courtroom of the Honorable Gerald S. Levin, United States District Court of California, 450 Golden Gate Ave., San Francisco, California.

Dated: May 21st, 1970.

/s/ Gerald S. Levin,
United States District Judge.

[Title omitted in printing]

[Filed June 4, 1970]

ORDER DENYING MOTION TO DISSOLVE STATE COURT TEMPORARY RESTRAINING ORDER.

The controversy before the court is clearly a labor dispute within the meaning of Sec. 301 of the National Labor Relations Act, as amended 29 U.S.C. § 185. Removal is proper under 28 U.S.C. § 1441.

In the prior hearing the court denied plaintiff's motion to remand. The only issue now before the court is whether or not the District Court is mandated to dissolve the State Court temporary restraining order. The Supreme Court decision in the recent case of *The Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, ... U.S. ... (June 1, 1970), is dispositive of the issue. Accordingly, It Is Ordered that the motion to dissolve the State Court temporary restraining order is Denied.

Dated: June 4, 1970.

/s/ Alfonso J. Zirpoli,
United States District Judge.

[Title omitted in printing]

[Filed December 1, 1970]

MOTION FOR CONTEMPT JUDGMENT

Plaintiffs show to the Court as follows:

1. On May 18, 1970, the Honorable Lewis E. Lercara, Judge of the Superior Court of the State of California for the County of Alameda, entered a Modified Temporary Restraining Order against defendants Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Robert Laird, James Muniz, Joseph Arenos, Louis Riga, Charles Mack, Lawrence Diaz, Edward Painter, Alex Ybarraloz, Leroy Nunes, Stanley Botello, Ronald Rocha, Art Soto, Jack

Sweeny, Richard S. Durassette, Robert Windsor, Al Leishman and Richard Saramento, and each of them, and their officers, agents, representatives, employees and members, and each and every and all other persons acting at the direction of or in concert with said defendants, enjoining them from:

a. Directing or ordering or otherwise inducing, the employees of the plaintiffs not to perform work for any of said companies;

b. Picketing at any facility or situs of equipment of the plaintiffs where the effect of such picketing is to induce, encourage or cause company employees not to work for plaintiffs;

c. Engaging in any activity for the purpose of causing or with the effect of causing, a stoppage of work for, or strike against plaintiffs;

d. Failing to withdraw any orders or directions to employees of plaintiffs that said employees should engage in a cessation of work for such companies.

2. A copy of such Modified Temporary Restraining Order has been duly served upon defendants, as more particularly appears from the Proof of Service originally filed by J. Farrell in the Superior Court for the State of California, in and for the County of Alameda, on May 21, 1970, a true and correct copy of which is attached as Exhibit A to the Affidavit of Counsel in Support of Application for an Order Shortening Time on file herein.

3. On June 4, 1970, the Honorable Alfonso J. Zirpoli, Judge of the United States District Court for

the Northern District of California, denied defendants' Motion to Dissolve the aforementioned Temporary Restraining Order, thereby continuing in effect said restraining order.

4. Defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Warehousemen & Helpers of America, has failed and refused to comply with the provisions of the Modified Temporary Restraining Order and has disobeyed and disregarded the provisions of said restraining order as follows:

a. Defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Warehousemen & Helpers of America, by its officers, agents and employees, has, since on or about November 30, 1970, directed and encouraged employees of plaintiffs Granny Goose Foods, Inc., Sunshine Biscuits, Inc. and Standard Brands, Inc. not to perform work for said companies.

b. Defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Warehousemen & Helpers of America, by its officers, agents and employees, has, since on or about November 30, 1970, directed, encouraged and assisted in picketing at the facilities of Granny Goose Foods, Inc., Sunshine Biscuits, Inc. and Standard Brands, Inc. in Oakland, California, and at other locations in the San Francisco Bay Area, where the effect of such picketing

has been to induce, encourage and cause employees of said companies not to work for said companies.

c. Defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Warehousemen & Helpers of America, by its officers, agents and employees, has, since on or about November 30, 1970, engaged in activity for the purpose of causing a stoppage of work and/or strike against Granny Goose Foods, Inc., Sunshine Biscuits, Inc. and Standard Brands, Inc.

d. Defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Warehousemen & Helpers of America, by its officers, agents and employees, has, since on or about November 30, 1970, failed to withdraw its orders and directions to employees of Granny Goose Foods, Inc., Sunshine Biscuits, Inc. and Standard Brands, Inc. that such employees should engage in a cessation of work for such companies.

5. By reason of the failure and refusal of defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, to comply with the provisions of said Modified Temporary Restraining Order, plaintiffs have been damaged in the sum of \$100,000.00 per day. Such damage has been incurred as a direct result of contemnors' flagrant, illegal and paralyzing strike activities which have not only damaged the business

of Granny Goose Foods, Inc., Sunshine Biscuits, Inc. and Standard Brands, Inc. but have severely injured the public by depriving it of the goods manufactured by these companies.

6. By reason of the failure and refusal of defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, described in paragraph 4, above, to comply with the provisions of said Modified Temporary Restraining Order, defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, has committed a criminal contempt of the authority of this Court.

Wherefore, plaintiffs move the Court as follows:

1. For an order adjudging defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America to be in civil and criminal contempt of this Court for having violated the terms of said Modified Temporary Restraining Order;

2. For an order ordering defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, to purge itself of said contempt by the payment to plaintiffs of full and complete damages occasioned by said contempt, together with all costs of

this proceeding, including reasonable attorneys' fees; and

3. For an order ordering defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, to be punished for its criminal contempt in such manner as the Court may deem just and proper.

Littler, Mendelson & Fastiff,
By /s/ George J. Tichy, II,
Attorneys for Plaintiffs.

[Title omitted in printing]

AFFIDAVIT OF WESLEY J. FASTIFF

State of California

County of San Francisco ss.

I, Wesley J. Fastiff, having first been duly sworn, depose and say:

I am an attorney licensed to practice in the State of California. I am a member of the law firm of Littler, Mendelson & Fastiff, 593 Market Street, San Francisco, California. Among the clients that we represent are the National Biscuit Company, Sunshine Biscuit Company, Standard Brands, Inc., Granny Goose Foods and Lady's Choice Foods.

On approximately November 9, 1970, I received a telegram from Teamsters Union Local No. 70 signed by Richard Sarmento, Business Agent, and A. N.

Leishman, Secretary-Treasurer, requesting a negotiating meeting for the above-named companies. Each of the above companies also received such a telegram. I am attaching a copy of this telegram as part of this Affidavit, marked Exhibit A.

On November 11, 1970, I responded to that telegram on behalf of the above-named companies declining the Union's request to engage in collective bargaining negotiations because of our contention that a contract is presently in full force and effect. A copy of my letter dated November 11, 1970 is attached to this Affidavit, marked Exhibit B.

On November 17, 1970, I received a letter from Duane B. Beeson, Esq., attorney for Teamsters Union Local No. 70 (which letter was dated November 13, 1970). Mr. Beeson's letter set forth the Union's demand that the companies bargain with the Union, notwithstanding the fact that the National Labor Relations Board has issued a complaint against the Union because of its attempt to force the companies to negotiate a new contract at a time when a labor agreement is in full force and effect between the parties. Mr. Beeson's letter further stated that Local 70 was of the opinion that the Modified Restraining Order obtained from the Alameda Superior Court on May 18, 1970 and removed to the Federal District Court was no longer in effect. Mr. Beeson's letter of November 13, 1970 is attached to this Affidavit, marked Exhibit C.

On November 20, 1970, I responded to Mr. Beeson's letter stating the companies' position that the com-

panies and Local 70 were bound by a National Master Freight Agreement and a Joint Council Seven Supplemental Agreement and that, therefore, it would not be proper for the companies to meet with Local 70 to negotiate separate individual contracts. I further stated the company's position with regard to the Modified Temporary Restraining Order and I quoted Judge Zirpoli's comments to the effect that the Order was in effect until set aside. A copy of my letter dated November 20, 1970 is attached to this Affidavit, marked Exhibit C.

On December 1, 1970, at approximately 11:00 a.m., I sent a telegram to Mr. Beeson and to Teamsters Local 70 stating that the Modified Temporary Restraining Order was presently in effect and that the Companies intended to move for a contempt judgment against Teamsters Local 70 at 10:30 a.m., December 2, 1970, before the Honorable Alfonso J. Zirpoli, Judge of the United States Federal District Court. A copy of this telegram is attached as Appendix D.

I have carefully read this Affidavit consisting of this and two other pages, and I certify that it is true and correct to the best of my knowledge and belief.

/s/ Wesley J. Fastiff.

Subscribed and sworn to before me this 1st day of December, 1970.

(Seal)

/s/ Nina M. Drake,
Notary Public—California

My Commission Expires July 8, 1973.

Exhibit A**Western Union Telegram****SFA055 (24)LD293****1970 NOV 9 PM 3:35****L OLE 116 WU PDB 2 EXTRA FAX OAKLAND CALIF 9 226P PST****WESLEY FASTIFF LITTLER MENDELSON SALTZMAN****593 MARKET ST SFRAN**

**REQUESTING NEGOTIATING MEETING BE SCHEDULED FOR
 NOVEMBER 17, 1970 10:00 A.M., ROYALL INN, HEGENBER-
 GER ROAD, OAKLAND, FOR PURPOSE OF NEGOTIATING NEW
 AGREEMENT, WHICH EXPIRED 4-1-70.**

PLEASE CONFIRM WITH UNDERSIGNED**RICHARD SARMENTO BUSINESS AGENT A N LEISHMAN****SECRETARY-TREASURER,****593 17 1970 10:00 4-1-70.****(246)****Exhibit B****November 11, 1970****Mr. A. N. Leishman****Secretary-Treasurer****Brotherhood of Teamsters and****Auto Truck Drivers****Local No. 70 of Alameda County****70 Hegenberger Road****Oakland, California 94621**

**Re: Granny Goose Foods, Lady's
 Choice Foods, National Biscuit
 Company, Standard Brands, Inc.
 and Sunshine Biscuit Company**

Dear Mr. Leishman:

**This letter is in response to the telegram which
 you sent to me and to the above-named companies on
 or about November 9, 1970.**

On behalf of such companies, I respectfully decline your request to meet on November 17, 1970. I am sure that you are aware that the position of the above companies is that they are covered by a collective bargaining agreement to which you are a party. The agreement is binding on both your Union and the companies.

Furthermore, the National Labor Relations Board has recently issued a formal unfair labor practice complaint against Local 70 setting forth the position of the NLRB in this matter.

Under these circumstances, meetings with regard to contract negotiations prior to a final determination by the National Labor Relations Board would be improper.

If you have any questions, please do not hesitate to contact me.

Very truly yours,
Wesley J. Fastiff

WJF:mh

cc: Mr. Richard Sarmento

Exhibit C

(Letterhead of
Brundage, Neyhart, Grodin & Beeson
Attorneys at Law

100 Bush Street, Suite 2600
San Francisco, California 94104
(415) 986-4060

Oakland Office
1330 Broadway
(415) 452-2888)

November 13, 1970

Wesley Fastiff, Esq.
Littler, Mendelson & Fastiff
593 Market Street
San Francisco, California

Re: Granny Goose - Teamsters
Local 70 litigation

Dear Mr. Fastiff:

This letter is prompted by our brief conversation a few days ago in which you inquired as to Local 70's purpose in asking for a negotiating meeting in the above referenced situation.

I have discussed the matter with Dick Sarmento, the business representative for Local 70 who is handling the matter, and have reviewed the files of the pending proceedings involving the parties. In order to avoid any misunderstanding, I thought it might be helpful to let you know my present thinking, which also reflects Local 70's present position.

The unfair labor practice complaint which has been issued does not in my opinion present an "open and

shut case." I feel there are very substantial defenses which can be advanced to show that Local 70 properly and validly extricated itself from any bargaining relationship with the employer which bound these parties to the National Master Freight negotiations. In these circumstances, Local 70 does not feel it is morally or legally bound to wait the outcome of the Labor Board proceeding to press its position that a separate contract should be negotiated.

With respect to the Section 301 action which was originally filed in the Alameda County Superior Court and removed to the federal district court, I do not understand from the file that there is presently in effect any order which forbids Local 70 from bargaining with the employer, or from pressing its position that it has a right to bargain for a separate contract. A motion to dissolve a temporary restraining order against economic action was denied by the federal court, but that temporary restraining order has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction.

Accordingly, the federal court case is pending, but there are no outstanding orders which affect the assertion by Local 70 of rights which it claims. I am content to allow the federal court action to lie dormant, in view of the activity in the Labor Board case. If you are inclined to press the federal court case, Local 70 would urge, among other things, that the identical issue is going to hearing before the Labor Board, and the federal court should defer.

I don't know whether there are any conclusions to be drawn from the foregoing analysis, but I would appreciate hearing from you if you feel any of my assumptions or information are wrong. In the meantime, Local 70 seriously wants to meet with the employer and insists that it has the right to negotiate a contract which differs from the National Master Freight agreement. I am hopeful you will advise your client to enter into negotiations. If not, Local 70 feels that it has every right to press its position.

Very truly yours,

/s/ Duane B. Beeson

DBB:cdv

cc: Mr. Richard Sarmento

Exhibit D**Western Union Telegram****Charge to the Account of 51-2899****12/1/70**

Send the following message, subject to the terms on back hereof, which are hereby agreed to

Report Delivery On Both Telegrams

Brundage, Neyhart, Grodin & Beeson

Attn: Duane Beeson, Esq. & Kenneth Silbert, Esq.

100 Bush Street

San Francisco, California

Teamsters Local 70

Attn: James Muniz, Pres. &

A. N. Leishman, Secty.-Treas.

70 Hegenberger Road

Oakland, California

**Re: Granny Goose Foods; Sunshine
Biscuits; Standard Brands**

As you are aware, there is presently in effect a temporary restraining order issued by the Honorable Lewis E. Lercara, Judge of the Alameda County Superior Court, which enjoins picketing and other activity for the purpose of causing or with the effect of causing a work stoppage or strike against the above companies. Despite the existence of that restraining order, members of Teamsters Local 70 have engaged in picketing and strike activity directed against those companies. Consequently, these companies intend to move for a contempt judgment against Teamsters Local 70 at 10:30 A.M. tomorrow, December 2, 1970 before the Honorable Alfonso J. Zirpoli, Judge of the

United States District Court, Federal Building, San Francisco.

Wesley J. Fastiff

Of Littler, Mendelson & Fastiff

[Title omitted in printing]

AFFIDAVIT OF DEL RANCHE

State of California

County of San Francisco ss.

I, Del Ranche, having first been duly sworn, depose and say:

I am Western Regional Distribution Manager of Standard Brands, Inc. The Company has a plant in Oakland, California, 921 98th Avenue.

On November 9, 1970, I received a telegram from Richard Saramento, Business Agent, and A. N. Leishman, Secretary-Treasurer of Local No. 70 of the Teamsters, a true and correct copy of which is attached hereto and incorporated herein by reference as though fully set forth. With respect to this telegram, I contacted our attorney, Wesley J. Fastiff, who is handling this matter. He advised me that he would respond to this telegram on behalf of our company.

The Oakland plant is located on a plot of land approximately $8\frac{1}{2}$ acres, $\frac{3}{4}$ of which is covered by our production facility and is located directly across the street from Granny Goose, Inc. At this plant, the Company is engaged in the processing of yeast, margarine and vinegar for distribution to our various wholesale customers.

At the Oakland plant we employ approximately 230 employees in the following classifications: Approximately 16 supervisory and management employees; approximately five laboratory and warehouse employees; approximately 20 maintenance employees and approximately 6 truck drivers who make local deliveries in the area and sometimes make deliveries in Fresno and Sacramento. These drivers are represented by Teamsters Local 70. Local 70 does not represent any other classification of our employees.

There are four entrance gates to our Oakland facility but three of these are locked at all times. The only one presently being used is off 98th Avenue. At approximately 6:20 A.M. Monday morning the plant manager at the Oakland facility called me at my home and advised me that pickets were in front of the Oakland plant. I arrived at the plant around 7:45 A.M. and observed seven or eight pickets on 98th Avenue at the entrance to our plant. Three of these pickets carried signs. Of these three pickets, I recognized two of these as Company drivers. The signs were about one foot by one and one-half feet and contained the words "Teamsters Local 70 on Strike".

Between the words "Local 70" and "On Strike" were written in crayon the words "Standard Brands". Our production and warehouse employees, maintenance employees and drivers did not cross the picket line and consequently did not work today.

Standard Brands, Inc. manufactures and sells bakers yeast to bakeries located in four Western States and manufactures and sells margarine to retailers

located in thirteen Western States. We manufacture and sell vinegar to processors located in California and Arizona. At present we have six trucks loaded at the plant, three of them are loaded with yeast and three with margarine. The yeast is under refrigeration in the trucks but I would estimate that it would be good for only another 24 hours. The margarine, which is loaded in our other three trucks, has an effective shelf life of about six weeks. I would estimate that for every day of the strike that we are unable to manufacture and deliver our products our Company is losing \$104,000 gross revenue. In addition to the above, we have Government contracts for the delivery of dry yeast to Saipan and Vietnam. These contracts call for us to deliver approximately 40,000 pounds of dry yeast a month. I do not know the value of these contracts. I would also like to state that in order to produce vinegar a certain type of bacteria, known as aceta bacteria, is a necessary ingredient. Any interruption in the vinegar making process will result in killing the bacteria which could take up to 18 months to again get back into full production because it takes that long for the bacteria to again become active. Our Company manufactures about five million gallons of vinegar per year.

In addition to the loss in gross revenues due to lost sales, the Company also faces the prospect of lost business that may not ever return upon cessation of the strike. The food industry is extremely competitive and the critical factor in having a successful business is to obtain an optimum amount of display space in the retail outlet. The average retail outlet does not

stock all competing brands of foods nor does it give equal display space to the brands that it does stock. If we are unable to supply our products to our retail outlets for any period of time, the retail outlets will be forced to change suppliers and give our display space to another supplier. It has taken many years of promotional and sales efforts to obtain our present amount of display space in the retail outlets and if a retail outlet switches, even temporarily, to another supplier, the chance of regaining that business is very slim. We are the only producer of margarine in this area that is being picketed by Local 70 and our many competitors will be eager and happy to take our shelf space that we have worked so long and hard to develop.

Due to the long years of promotional and sales efforts and the competitiveness of the market, a loss of such display space due to the current picketing would make an assessment of monetary damages extremely difficult and would constitute an incalculable loss in good will.

On Tuesday, December 1, 1970, at approximately 11:45 A.M., I personally approached three picketers who were picketing the main entrance to our plant on 98th Avenue in Oakland, California. The three picketers were Ray Matthews, Don Chrissman and Jack Loughlin. Each of them are employees of Standard Brands and are members of Teamsters Local 70. I had with me copies of the Modified Temporary Restraining Order and Order To Show Cause issued on May 18, 1970, by the Superior Court for the County of Alameda which prohibited Local 70 and

its members and agents from picketing our facilities. I informed the three picketers of the Order and I read to them paragraphs (b) and (c) of the Order. I handed them a copy of the Order and asked them to accept it and they responded "We have been instructed not to accept anything." I then told them "I have read it to you and since you will not take it, I will drop it here for you."

I certify that the above is true and correct.

/s/ Del Rancho

Subscribed and sworn to before me this 1st day of December, 1970.

(Seal)

Nina M. Drake

Notary Public—California

My Commission Expires

July 8, 1973

BD+

SUNSHINE OAK

49P PST NOV 9 70 LB294

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SUNSHINE BISCUITS INC

851 21ST AVE OAKLAND CALIF

REQUESTING NEGOTIATING MEETING BE SCHEDULED FOR NOVEMBER 17, 1970, 10:00 A.M., ROYALL INN, HEGENBERGER ROAD, OAKLAND, FOR PURPOSE OF NEGOTIATING NEW AGREEMENT, WHICH EXPIRED 4-1-70. PLEASE CONFIRM WITH UNDERSIGNED

RICHARD SARMENTO, BUSINESS AGENT A N LEISHMAN
SECRETARY-TREASURER.

851 81 17 1970 10:00 4-1-70.

(239)

[Title omitted in printing]

AFFIDAVIT OF WM. C. DREHER

State of California

County of San Francisco—ss.

I, Wm. C. Dreher, having first been duly sworn, depose and say:

I am Plant Manager of the Sunshine Biscuits, Inc., plant in Oakland, California, located at 851 81st Avenue, telephone 638-4600. I have held this position for five months. As Plant Manager I am in charge of the general overall operations of the Oakland plant.

On November 9, 1970, I received a telegram from Richard Saramento, Business Agent, and A. N. Leishman, Secretary-Treasurer, of Local No. 70 of the Teamsters, a true and correct copy of which is attached hereto and incorporated herein by reference as though fully set forth. With respect to this telegram, I contacted our attorney, Wesley J. Fastiff, who is handling this matter. He advised me that he would respond to this telegram on behalf of our company.

Sunshine Biscuits, Inc. is engaged in the processing, distribution and wholesale sale of bakery products. The Oakland plant manufactures bakery products for distribution to customers in the thirteen Western States, including the states of Hawaii and Alaska.

The Oakland plant is located on an eleven acre site in a single multi-story building which has 880,000 square feet of manufacturing and storage space. There are approximately 700 individuals employed at the plant, who may be classified as follows: approximately

30 management officials, approximately 625 production and warehouse employees, including approximately 35 sanitation employees; approximately 30 maintenance employees, approximately 30 office clerical employees; and approximately 15 truck drivers and dock helpers. The truck drivers and dock helpers are all represented by Teamsters Local 70. Those are the only employees represented by Local 70.

The Oakland plant, which operates on a 24-hour per day basis, may be reached by four separate entrances. One entrance leads directly to our office and is opened to the street. The second entrance is used solely for the receipt of raw materials. The third entrance is used solely for the shipment of our manufactured products. The fourth entrance is used solely by employees and is adjacent to a parking area where employees park their cars.

At approximately 6:00 A.M., November 30, 1970, I arrived at the Oakland plant and observed pickets at the shipping and receiving entrances to our premises. There were no pickets at the employee entrance or at the entrance that leads directly to the office. I have been informed and believe that the pickets had been stationed at the shipping and receiving entrances since approximately 11:00 P.M. November 29. I observed two pickets at the shipping entrance and two or three at the receiving entrance. Of these four or five pickets, I recognized at least two of them as Sunshine Biscuit employees, who are members of Teamsters Local No. 70. All of the pickets carried signs which read as follows: "Teamsters Local 70 on

Strike". Between the words "Local 70" and "On Strike" was written "Sunshine Biscuits". The signs were approximately a foot and a half by two feet in dimension. The words "Teamsters Local 70 on Strike" were printed and the lettering was approximately four inches in height. The words "Sunshine Biscuits" were handwritten in between the words "Local 70" and "On Strike".

On November 30 the only employees who had observed the picket line had been our drivers and dock helpers, all of whom are members of Teamsters Local 70. Additionally, we have had shipments of materials which were scheduled to be delivered to the Oakland plant which have not been delivered because drivers of the trucks carrying these materials have refused to cross the picket line.

Since our drivers and dock helpers have been on strike, none of our manufactured products have been shipped from our premises by truck. Normally, approximately 80% of our processed products are shipped by truck from our plant and the other 20% are shipped by rail. Rail delivery is generally unavailable to the Company for the primary reason that our customers would not be able to receive our products by rail or cannot do so economically.

Our Company manufactures biscuits and cookies which have a relatively short shelf life. -As a result of large scale manufacturing, we have certain products at our facility which have been held for nearly the limit of preshipment time allowed. If these items are not delivered to our customers soon, there may

be spoilage or the product may have such a short remaining life to make their delivery impossible.

If the strike continues and the pickets remain at the shipping and receiving entrances to our premises, I estimate that our loss of revenues will be approximately \$200,000 per day. This is the value of manufactured products which we would ship daily from our Oakland facility to our customers. Of this \$200,000 figure, approximately \$15,000 would be derived from payments for our export of cookies and crackers to military commissaries located throughout the Pacific Far East area. In addition, we have a special order for approximately \$50,000 worth of canned cookie items destined for military installations in the Pacific Far East later this week which we are unable to ship as long as the pickets remain at the shipping gate. In addition, there are several shipments of specialized food items for Christmas ready for immediate delivery. If these items are not shipped immediately, such sales shall be irretrievably lost to the Company and such products may similarly prove valueless.

In addition to the loss in gross revenues due to lost sales, the Company also faces the prospect of lost business that may not ever return upon cessation of the strike. The food industry is extremely competitive and the critical factor in having a successful business is to obtain an optimum amount of display space in the retail outlet. The average retail outlet does not stock all competing brands of foods nor does it give equal display space to the brands that it does stock.

If we are unable to supply our products to our retail outlets for any period of time, the retail outlets will be forced to change suppliers and give our display space to another supplier. It has taken many years of promotional and sales efforts to obtain our present amount of display space in the retail outlets and if a retail outlet switches, even temporarily, to another supplier, the chance of regaining that business is very slim.

Due to the long years of promotional and sales efforts and the competitiveness of the market, a loss of such display space due to the current picketing would make an assesement of monetary damages extremely difficult and would constitute an incalculable loss in good will.

On Tuesday, December 1, 1970, at approximately 1:40 P.M., I approached two pickets who were sitting in a car which was parked at the entrance to our plant which is used by trucks coming in and out of the plant. There was a picket sign posted on the car as well as on the gate nearby. It was raining at the time and the car with the picket signs was the only evidence of picketing. I went up to the car and I recognized one of the pickets as Ross Edwards, an employee of the Company and a member of Local 70. Edwards rolled his window down. I told him and the other person that there was a Temporary Restraining Order outstanding that prohibited picketing. I told him there were some specific points he should know about and I read the language from the Order from paragraphs (a), (b), (c) and (d) on

page two of the Order. I also read to him that portion of the last page which stated that the Order applied not only to the Union, but to its agents, representatives, employees and members. I then told them that they were in contempt of the Order as individuals. I then handed the modified Temporary Restraining Order to Edwards and he took it and I left.

I have carefully read this Affidavit consisting of six pages, including this page, and I certify that it is true and correct to the best of my knowledge and belief.

/s/ Wm. C. Dreher

Subscribed and sworn to before me this 1st day of December, 1970.

(Seal)

Nina M. Drake

Notary Public—California

My commission expires July 8, 1973

BD+

SUNSHINE OAK

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SUNSHINE BISCUITS INC

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RICHARD SARMENTO, BUSINESS AGENT A N. LEISHMAN
SECRETARY-TREASURER.

851 81 17 1970 10:00 4-1-70.

(239)

[Title omitted in printing]

AFFIDAVIT OF ROBERT B. CRALL

State of California

County of San Francisco—ss.

I, Robert B. Crall, having been first duly sworn, depose and say:

I am Director of Industrial Relations of Granny Goose Foods. I have held this position for one and one-half years. During said time I have been at the corporate headquarters in Oakland, California. I am in charge of Industrial Relations for Granny Goose Foods facilities which are located in the States of

California and Hawaii. The corporate headquarters are located at 930 98th Avenue, Oakland, California, telephone 635-5400. Granny Goose Foods is engaged in the processing, distribution and wholesale sale of potato chips and other food products.

On November 9, 1970, I received a telegram from Richard Saramento, Business Agent, and A. N. Leishman, Secretary-Treasurer, of Local No. 70 of the Teamsters, a true and correct copy of which is attached hereto as Exhibit A and incorporated herein by reference as though fully set forth. With respect to this telegram, I contacted our attorney, Wesley J. Fastiff, who is handling this matter. He advised me that he would respond to this telegram on behalf of our company.

Adjacent to our corporate headquarters at 930 - 98th Avenue, Oakland, California, is a production facility which covers approximately one city block. At the production facility we employ approximately 225 production and maintenance workers, 15 warehouse employees, 7 driver salesmen, 5 office clerical employees, 6 managerial employees, and 16 drivers. Of the 16 drivers, 11 make local deliveries and work on the dock loading the trucks. These 11 drivers are represented by Teamsters Local 70. They are the only employees at the Oakland facility represented by Local 70. We employ five long-haul drivers who also work out of the Oakland facility.

There are three entrances to the production facility at the Oakland plant. One entrance, off 98th Avenue, is the entrance for our employee use. This entrance

leads to the front of the premises. Another entrance, off 98th Avenue, is the entrance that our driver salesmen use and is also the entrance that drivers who deliver bulk oil for our plant use. The third entrance, off Merced Street, which is reached by coming in from 98th Avenue, leads to the rear entry of the premises. This entrance is where we receive the raw materials for our products and where our manufactured products are shipped from.

Monday morning, at approximately 6:30 a.m., I received a telephone call from my plant manager advising me that Teamsters Local 70 was picketing the Oakland facility. I arrived at the premises at approximately 8:15 a.m. I observed five pickets who were walking up and down 98th Avenue in front of our premises. In addition, I observed some pickets across the street who were picketing Standard Brands, Inc. Four of the five pickets were carrying signs, approximately 1½ to 2 feet in dimension with the words "Teamsters Local 70 On Strike" printed on them. Between the words "Teamsters Local 70" and "On Strike" on the picket sign were written in the words "Granny Goose".

The fifth individual picketing on the 98th Avenue premises placed his picket sign on the bumper of an automobile which was parked on 98th Avenue. The sign had the same wording as the other pickets. I recognized one of the pickets as being one of the Granny Goose local delivery drivers.

None of our dock workers and local delivery drivers, long-haul drivers, warehouse employees, produc-

tion and maintenance employees and driver salesmen had crossed the picket line to report for work.

At around 9:30 a.m. Monday morning our Oakland Sales Manager advised me that our warehouses in El Cerrito and Newark, California were being picketed by Teamsters Local 70 and that only one of the trucks had left these premises to make delivery of our products, and that this sales truck left said premises prior to the time Local 70 placed its pickets around the premises. We have approximately five or six driver salesmen who deliver products from our Newark warehouse. Approximately 12 to 15 driver salesmen deliver products out of our El Cerrito warehouse.

Granny Goose Foods manufactures potato chips and general snack foods, including corn products and nuts. All of the above items are perishable. I would estimate that the potato chip products have a shelf life of approximately five weeks. We generally make delivery of these products within a week and one-half after they are manufactured and packaged. I would estimate that the nuts have a shelf life of approximately two months and the corn products a shelf life of approximately seven weeks. In addition to the above, we distribute various meat products, including polish sausages, hot sticks and beef jerky. I do not know the shelf life of these products, but I would estimate that it is very short.

Earlier Monday, we received a load of potatoes. These potatoes were delivered and remained on the truck without a tarp, ready for our production workers to unload and process this morning. Nothing has

been done with respect to these potatoes as yet. Within a short time, and maybe within a day, these potatoes will be valueless to us. I am unable to estimate the value of that shipment of potatoes.

I would estimate that our Company is losing approximately \$100,000 gross revenue per day because of sales lost, due to our inability to make delivery of our products. We now have \$150,000 of raw materials and finished goods at our warehouse. If something is not done with respect to these products, within a short time they will be of no value to the Company. Approximately 20% of the Company's sales consists of products which are distributed to the United States Military. A substantial portion of this is shipped directly to military bases in the Far East through one of the Company's brokers.

The effect of today's strike is that our Company did not make any deliveries to retailers in El Cerrito and Alameda Counties today. If the strike continues, we will be unable to make deliveries throughout Northern California in the future.

December has traditionally been our best sales volume month of the year. The week between Christmas and New Year's Eve is particularly busy for us and is the highest sales volume week of the year.

In addition to the loss in gross revenues due to lost sales, the Company also faces the prospect of lost business that may not ever return upon cessation of the strike. The snack food industry is extremely competitive and a critical factor in having a successful business is to obtain an optimum amount of

display space in the retail outlet. The average retail outlet does not stock all competing brands of snack foods nor does it give equal display space to the brands that it does stock. If we are unable to supply our products to our retail outlets for any period of time, the retail outlets will be forced to change suppliers and give our display space to another supplier. It has taken many years of promotional and sales efforts to obtain our present amount of display space in the retail outlets and if a retail outlet switches, even temporarily, to another supplier, the chance of regaining that business is very slim. At the present time all of our competitors are operating. We are the only snack food company which is being picketed by Local 70.

Due to the long years of promotional and sales efforts and the competitiveness of the market, a loss of such display space due to the current picketing would make an assessment of monetary damages extremely difficult and would constitute an incalculable loss in good will.

On Tuesday, December 1, 1970, at approximately 11:15 a.m., I approached the Merced Street entrance to our plant where a car was parked in the driveway entrance. There were two Local 70 picket signs placed in the car and Thomas Pitts was standing next to the car. Thomas Pitts is an employee of the Company and is a member of Local 70. I gave him a copy of the Modified Temporary Restraining Order and Order to Show Cause issued by the Superior Court for the County of Alameda on May 18, 1970 in Case No.

400637 and explained to him that it was still in force and effect and that it prohibited him from picketing. He said thank you and took it and went and sat inside his car and read it. After reading the papers he remained in his car and did not leave.

There was another picketer walking up and down the sidewalk whom I did not recognize. I walked up to him and handed him a copy of the Modified Temporary Restraining Order but he refused to take it.

I have carefully read this affidavit, consisting of six pages, including this page, and I certify that the information is true and correct to the best of my knowledge and belief. Dated: December 1, 1970

/s/ Robert B. Crall

Subscribed and sworn to before me this 1st day of December, 1970.

(Seal)

/s/ Nina M. Drake

Notary Public—California

My commission expires July 8, 1973

BD+

SUNSHINE OAK

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SUNSHINE BISCUITS INC

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RICHARD SARMENTO, BUSINESS AGENT A N LEISHMAN
SECRETARY-TREASURER.

851 81 17 1970 10:00 4-1-70.

(239)

[Title omitted in printing]

AFFIDAVIT OF COUNSEL IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

State of California

County of San Francisco—ss.

I, George J. Tichy II, being-first duly sworn depose and say as follows:

I am an attorney for plaintiffs in the above entitled matter and have represented them in the various proceedings herein.

On May 18, 1970, the Honorable Lewis E. Lercara, Judge of the Superior Court for the County of Alameda, State of California issued a Modified Temporary Restraining Order against defendant Brother-

hood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters and the other defendants enjoining said defendants from engaging in picketing at any facilities or situs of equipment of plaintiffs where the effect of such pickets is to induce, encourage or cause employees of plaintiffs not to work for plaintiffs.

A copy of the Modified Temporary Restraining Order has been duly served on defendants, as appears from the Proof of Service filed by J. Farrell in Superior Court of the State of California, in and for the County of Alameda, on May 21, 1970, a true and correct copy of which is attached hereto as Exhibit A and incorporated herein by reference.

On June 4, 1970, the Honorable Alfonso J. Zirpoli, Judge of the United States District Court, denied defendants' Motion to Dissolve said Modified Temporary Restraining Order, thereby continuing said Modified Temporary Restraining Order in full force and effect.

I am informed and believe that since on or about November 30, 1970, defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, has directed, induced and encouraged a cessation of work by picketing at the premises of Granny Goose Foods, Inc., Sunshine Biscuits, Inc. and Standard Brands, Inc. in Oakland, California, and at other locations in the San Francisco Bay Area.

The aforementioned picketing, which has had the effect of causing a work stoppage and strike at said

companies by their employees, is in direct violation of the terms of the Modified Temporary Restraining Order issued by the Honorable Lewis E. Lercara on May 18, 1970, and left in effect by the order of the Honorable Alfonso J. Zirpoli on June 4, 1970, denying defendants' Motion to Dissolve said Modified Temporary Restraining Order. I am informed and believe that such picketing and work stoppage will cause immediate, grave and irreparable damage to plaintiffs and the customers of plaintiffs. I am further informed and believe that said irreparable harm will continue until defendant is compelled to obey the terms of the Modified Temporary Restraining Order issued on May 18, 1970.

It presently appears that the only means possible of compelling defendants to comply with the terms of the Modified Temporary Restraining Order is for this Court to assert its contempt power to compel such compliance under pain of monetary fine or imprisonment. It is, therefore, imperative that this Court issue an Order shortening time for the hearing upon plaintiff's Motion for Contempt Judgment in order to avoid irreparable harm to plaintiffs and to insure proper enforcement and prevention of further violations of the Modified Temporary Restraining Order.

/s/ George J. Tichy, II

Subscribed and sworn to before me this 1st day of December, 1970.

(Seal)

Nina M. Drake

Notary Public—California

My commission expires July 8, 1973

[Title omitted in printing]

[Filed Dec. 1, 1970]

ORDER SHORTENING TIME

This case having come before the Court upon plaintiffs' application for an Order Shortening Time for hearing upon plaintiffs' Motion for Contempt Judgment, and good cause therefor having been shown;

Now, Therefore, It Is Ordered that plaintiffs' application be and hereby is granted, and that said motion shall come on for hearing at 10:30 A.M. on the 2nd day of December, 1970, or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Alfonso J. Zirpoli, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California.

Dated: December 1, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge

[Title omitted in printing]

[Filed Dec. 2, 1970]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ORDER OF CONTEMPT

I

An order of contempt is proper upon the violation of a lawful injunctive order.

18 U.S.C.A. Section 401 (3);

Siebring v. Hansen, 346 F.2d 474 (8th Circuit, 1965);

In re Chiles, 89 U.S. 157 (1875).

II

Where, as here, a lawful injunctive order was issued by a state court prior to removal of the underlying action to United States District Court, the injunctive order remains in full force and effect until dissolved or modified by the District Court.

28 U.S.C. Section 1450;

State v. Fuller, 296 N.Y.S.2d 37, 39, (1968).

In this regard, 28 U.S.C. Section 1450 provides in relevant part as follows:

"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." (Emphasis supplied.)

III

Upon removal of a cause from state court to United States District Court, the federal court is not bound by any alleged rule of state practice which is in conflict with a federal statute.

Munsey v. Testworth Laboratories, 227 F.2d 903 (6th Cir. 1955);

Savell v. Southern Ry. Co., 93 F.2d 377, 379 (5th Cir. 1937).

IV

Actual knowledge or notice of the order is sufficient to charge the violator with contempt. Such

knowledge or notice of the order may result either from service of process or otherwise.

Pettibone v. United States, 148 U.S. 197 (1893);

Denver-Greeley Valley Water Users Assn. v. McNeil, 131 F.2d 67 (10th Circuit, 1942);

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. United States, 275 F.2d 610 (4th Circuit, 1960), cert. den. 362 U.S. 975.

V

To establish a civil contempt of the Court's order, it is not necessary to show that the disobedience to the order was willful.

Stateler v. California National Bank, 77 F. 43 (CC, ND Cal. 1896);

Water Co. v. American Strawboard Co., 75 F. 972 (CC, D. Ind 1896).

VI

Upon a finding of contempt, the Court may, in its discretion, punish by fine or imprisonment such contempt of its authority.

18 U.S.C. Section 401.

VII

United States District Court may require civil contemnors to pay specific sum, not as sanction to assure

further compliance but as compensation to or offset of damages of adversary because of past dereliction.

Folk v. Wallace Business Forms, Inc., 394 F.2d 240 (4th Circuit, 1968).

VIII

Upon a finding of criminal contempt, the trial judge has much discretion in the imposition of fines and may take into consideration the extent of willful and deliberate defiance of the Court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defiance of the order and the importance of deterring future acts.

United States v. United Mine Workers of America, 340 U.S. 258, 303 (1946).

IX

Successive and separate contempts are punishable as separate offenses.

Bullock v. United States, 265 F.2d 683 (6th Circuit, 1959), cert den. 360 U.S. 909.

Littler, Mendelson & Fastiff
By /s/ George J. Tichy, II
Attorneys for Plaintiffs

In the United States District Court
Northern District of California
No. C 70 1057

Before: Hon. Alfonso J. Zirpoli, Judge

Granny Goose Foods, Inc., et al,
Plaintiffs,

vs.

Brotherhood of Teamsters & Auto
Truck Drivers, Local No. 70 of Ala-
meda County, et al., Defendants.

[Filed Dec. 2, 1970]

Appearances:

For Plaintiffs: George J. Tichy, II, Esq.
Wesley J. Fastiff, Esq.
J. Richard Thesing, Esq.

For Defendants: Duane B. Beeson, Esq.
Kenneth N. Silbert, Esq.

REPORTER'S TRANSCRIPT

December 2, 1970

Wednesday

*Findings of Fact and Conclusions of Law and
Order and Judgment of Criminal Contempt*

I hereby certify that the annexed instrument is
a true and correct copy of the original on file in my
office.

ATTEST:

C. C. Evensen,
Clerk, U. S. District Court
Northern District of California
By /s/ Edward C. Sorenson
Deputy Clerk

Dated Dec. 2, 1970

December 2, 1970—Wednesday

[Reporter's partial transcript.]

The Court: All right, then, considering the nature of the case, the urgency involved, the case is submitted and I am going to make a ruling now.

To be specific and dispel any suspense, it's obvious to me that the Defendant Union is in contempt of the order of the Court, and that I must accordingly enter judgment based upon that contempt.

This case had its origin in an action filed in the Superior Court of the State of California in and for the County of Alameda, in which the plaintiffs sought to restrain certain picketing and work stoppage activities of the defendants. The Honorable Lewis E. Lercara of said Superior Court, on May 18, 1970, entered a modified temporary restraining order against the defendants which enjoins the defendants, Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Robert Laird, James Muniz, Joseph Arenos, Louis Riga, Charles Mack, Lawrence Diaz, Edward Painter, Alex Ybarraloz, Leroy Nunes, Stanley Botello, Ronald Rocha, Art Soto, Jack Sweeny, Richard S. Durasette, Robert Windsor, Al Leishman and Richard Saramento, and each of them, and their officers, agents, representatives, employees and members, and each and every and all other persons acting at the direction of or in concert with said defendants, enjoining them from:

a. Directing or ordering or otherwise inducing, the employees of the plaintiffs not to perform work for any of said companies;

b. Picketing at any facility or situs of equipment of the plaintiffs where the effect of such picketing is to induce, encourage or cause company employees not to work for plaintiffs;

c. Engaging in any activity for the purpose of causing or with the effect of causing, a stoppage of work for, or strike against plaintiffs;

d. Failing to withdraw any orders or directions to employees of plaintiffs that said employees should engage in a cessation of work for such companies.

A copy of that modified temporary restraining order was duly and timely served upon the Defendant Union, as appears from the affidavit on file in these proceedings and the stipulation arising in connection with the testimony of Mr. Farrell.

Thereafter, on May 18, 1970, the defendants petitioned to remove the said cause to this Court under the provisions of Section 1441 of Title 18, U.S. Code, on a claim that this Court has original jurisdiction under Section 301 of the National Labor Relations Act as amended, 29 U.S.C. Section 185, and at the same time moved to dissolve the injunction of the State Court on the ground that an injunction issued by a State Court against striking and picketing activities by a labor organization and its agents must be dissolved for lack of jurisdiction by a Federal Court following removal of the proceedings, citing as authority *Sinclair Refining Company vs. Atkinson*, 370 U.S. 195.

On May 22nd, 1970, the plaintiffs moved to remand the case to the said Superior Court. Following a hearing in this Court on May 27, 1970, this Court denied the motion for remand, and on June 4, 1970, entered its formal order denying defendants' motion to dissolve the State Court's temporary restraining order. That denial of the motion to dissolve the restraining order was based on the case of *Boys Market, Inc. vs. Retail Clerks' Union, Local 770*, decided by the Supreme Court on June 1, 1970, wherein the Supreme Court expressly overruled its prior decision in the *Sinclair* case, *supra*, upon which the defendants had relied.

The order of the Court of June 4, 1970, provides in its pertinent part:

"The only issue now before the Court is whether or not the District Court is mandated to dissolve the State Court temporary restraining order. The Supreme Court decision in the recent case of *Boys Market, Inc., v. Retail Clerks' Union, Local 770*, — U.S. — (June 1, 1970), is dispositive of the issue. Accordingly, It Is Ordered that the motion to dissolve the State Court temporary restraining order is denied."

The order was dated June 4, 1970.

Defendants' continuing contention that the order of Judge Lercara is no longer in effect is without merit, not only by reason of the order of this Court which denies the motion to dissolve the same, thereby leaving it in continuing full force and effect, but also by reason of the provisions of the Federal removal statute, namely, Section 1450 of Title 28, United States Code, which in its pertinent part provides:

"All injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the District Court."

The Court further notes that since the entry of that order of June 4th, nothing was done to bring this case at issue, and as far as the record discloses, there is no answer on file on the part of the defendants herein.

The Court further notes that the basic objection, and the only objection made a matter of written record in the form of a formal motion, was the motion to dissolve on the theory that the *Sinclair* decision was applicable.

Under all these circumstances, the Court is satisfied that the matter is properly before it on an order to show cause why the defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, should not be found in contempt by reason of the alleged activities on the part of the Union, or caused directly by the Union.

This Court, after having heard all of the evidence before it, including the testimony of the witnesses Crall, Dreher and Ranche, and the stipulation with relation to the exchange of correspondence between counsel evidenced by the affidavit of Wesley J. Fastiff, is satisfied that the said defendant, Local No. 70, is in contempt of the order of this Court. It is satisfied that the contempt was deliberate and designed to flout the order of this Court.

One must bear in mind, as the Supreme Court again said in *United States vs. Mineworkers*:

"The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and wilfully refuses his obedience does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the wilfully and deliberate defiance of the Court's order and the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendants' defiance as required by the public interest and the importance of deterring such acts in the future. Because of the nature of such standards, great reliance must be placed upon the discretion of the trial court."

The Court in its discretion having found from the testimony and the affidavits which I have just alluded to—the Court is satisfied that the Defendant Union, or Respondent Union in this case, did in fact comport itself in such manner as to direct and order employees of the plaintiff not to work for any of the companies involved herein, namely, Granny Goose Foods, Sunshine Biscuits, Inc., and Standard Brands, Inc.; that the Union did direct and order the picketing of the facilities and situs of equipment of these three named companies, where the effect of the picketing was to induce, encourage or cause employees not to work for plaintiffs; that the Union engaged in activities for the purpose of causing, or with the effect of causing, a work stoppage for or strike against the

three companies I just indicated; that the Union has failed to withdraw any orders or directions to employees of these three companies that said employees should engage in a cessation of work for such companies.

Now, having indicated that this was a wilful form of conduct on the part of the defendant, Local 70, it constitutes, as such, an attempt to repudiate and override the instrument of Government in the situation where Government action may be or is indispensable.

Based upon these findings, the Court concludes and finds that the defendant Local No. 70 is in contempt of an outstanding order of this Court. And it appearing that the violation of the Court's order was in open and flagrant defiance of the order of the Court, it is adjudged that the defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association, be fined in the sum of \$200,000, to be paid into the Treasury of the United States through the Clerk of this Court.

\$150,000 of that fine is conditional on the said defendants' failure to purge itself within 24 hours of the date and hour of the signing of the Court's order; \$100,000 of said fine is conditioned upon the said defendant's, namely, Local No. 70, failure to purge itself within 48 hours of the date and hour of this order; and \$50,000 of said fine is conditioned upon the said defendants', Local No. 70, failure to purge itself

within 72 hours of the date of the signing of the Court's order.

Counsel for the petitioner and plaintiff are directed to secure a transcript of the proceedings, at least a transcript of the order of this Court as orally pronounced, reduce the same to writing and submit it for the Court's signature.

Mr. Silbert, I assume you did the best you could under the circumstances. It is unfortunate that the Court was faced with a situation in which it had to find the defendant Union in contempt of Court. When the Court does so, it wants counsel to understand that despite the action taken by the Court, the Court does not mean in any way to appear to be punishing counsel or to appear to be unhappy with counsel. I recognize that the lawyers in any case and in every case must make the best of whatever situation confronts them at the time.

All right.

MR. SILBERT: Your Honor, we intend to appeal your decision, and I'd request a stay of your order pending appeal.

THE COURT: Well, I will grant you a stay of the order upon the deposit of a bond of \$1,000,000 to cover damages.

MR. SILBERT: Thank you, Your Honor.

December 2, 1970, Wednesday at 5:45 p.m. AJZ.

/s/ Alfonso J. Zirpoli

Judge of the United States

District Court

**United States District Court
for the Northern District of California**

No. C-70-1057 AJZ

<p>Granny Goose Foods, Inc., et al.,</p> <p>vs.</p> <p>Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Ala- meda County, et al.,</p>	}	<p>Plaintiffs,</p> <p>Defendants.</p>
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NOTICE OF APPEAL

Brotherhood of Teamsters and Auto Truck Drivers, Local 70, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of Criminal contempt and each and every provision contained in said Order and Judgment issued by this Court on December 2, 1970 in Case No. C-70-1057 AJZ.

Dated: December 3, 1970

Brundage, Neyhart, Grodin & Beeson
By: /s/ Kenneth N. Silbert
Attorneys for Defendant

In the United States Court of Appeals
for the Ninth Circuit

No. 26,838

<p>Granny Goose Foods, Inc., et al., vs. Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70, Alameda County,</p>	}	<p>Appellees, Appellant.</p>
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[U.S.C.A. Filed Dec. 3, 1970]

[U.S. Dist. Ct., Northern Dist. of California

Filed Dec. 7, 1970]

ORDER

Before: HAMLEY and BROWNING, Circuit Judges

The payment of the fine imposed upon appellant by the district court in this proceeding, is stayed pending disposition of this appeal, upon the following conditions: (1) appellant shall immediately purge itself of the asserted contempt of court adjudicated by the district court and shall, pending disposition of this appeal, fully comply with the court order or orders which the district court held had been disobeyed, including the return to available work by employees of appellees who are members of appellant union; and (2) appellant shall post a surety bond, in a form approved by the district court, in a sum

equal to the fine for which appellant becomes liable under the terms of the order under review, conditioned upon the payment of such fine in the event it is upheld on appeal.

This order is subject to reconsideration if a memorandum seeking reconsideration is filed by appellees by December 14, 1970.

Dated: December 3, 1970

United States Circuit Judges

(Letterhead of
Northwestern National Insurance Company
of

Milwaukee, Wisconsin
A Stock Company)

Bond No. S-667560

Premium: \$438.00

[Title omitted in printing]

[Filed Dec. 7, 1970]

Whereas, the Defendants desire to give an undertaking for stay of order imposing fine under Rule 38A of Federal Rules of Criminal Procedure for the United States District Court in and for the Northern District of California.

Now, Therefore, the undersigned Northwestern National Insurance Company, a corporation organized

and existing under the laws of the State of Wisconsin, and duly authorized to transact a general surety business in the State of California, does hereby obligate itself, its successors and assigns to the above entitled court under statutory obligations in the sum of Fifty Thousand and No/100 (\$50,000.00) Dollars.

In testimony whereof the said Surety has caused these presents to be executed and its corporate seal attached by its duly authorized Attorney-in-Fact at San Francisco, California this 4th day of December, 1970.

Northwestern National Insurance Company
By: /s/ John L. Molinari, Attorney-in-Fact

[Title omitted in printing]

[Filed Dec. 8, 1970]

ORDER APPROVING BOND

The Court has examined the bond filed by Defendant, Brotherhood of Teamsters and Auto Truck Drivers, Local 70, pursuant to the Order of the United States Court of Appeals for the Ninth Circuit, dated December 3, 1970, and hereby approves the form of said bond.

Dated: December 7, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge

[Title omitted in printing]

[Filed Dec. 4, 1970]

**AFFIDAVIT OF RICHARD SARMENTO RE
COMPLIANCE WITH CONTEMPT ORDER**

State of California

City and County of San Francisco—ss.

Richard Sarmento, being first duly sworn, deposes as follows:

I am employed as a business representative for Teamsters Local 70, which is party defendant in the above-entitled case. I am assigned to handle the representation of Local 70's members who are employed by the plaintiffs.

In the forenoon of December 3, 1970, I instructed various Local 70 members who were assisting me in the strike against plaintiffs to go to each of the locations where picketing was in effect and direct all pickets to return to Local 70's headquarters. All the pickets had returned to Local 70's office by 1:00 p.m. on that day. I informed all pickets that there was a court order in effect which terminated the strike, and that there would be no further picketing, and that plaintiff's employees were to return to work. There are no further strike or picketing activities in effect, and all such activities had come to an end prior to 1:00 p.m. on December 3, 1970.

In the late afternoon of December 3, 1970, I was informed by Local 70's attorney that the United States Court of Appeals had entered an order which was conditional upon Local 70 terminating all strike and picketing activity. Although we have terminated

all such activity, on the advice of Mr. Beeson on the morning of December 4, 1970 I sent the following telegram to each and every member of Local 70 who was participating in the strike:

"Pursuant to court order you are notified that the strike has ended and you are directed to return to work."

The telegram was sent to the home address of each member.

/s/ Richard Sarmento

Subscribed and sworn to before me this 4th day of December, 1970

(Seal)

/s/ Belle Kendrick

Notary Public

City and County of San Francisco

My Commission Expires Oct. 29, 1973

In the United States District Court for the
Northern District of California

C-70-1057-AJZ

Granny Goose Foods, Inc. et al.
Plaintiffs-Appellees,
vs.

Brotherhood of Teamsters & Auto
Truck Drivers, Local No. 70 of Ala-
meda County et al
Defendants-Appellants.

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. C. Evensen, Clerk of the United States Dis-
trict Court for the Northern District of California,
do hereby certify that the foregoing and accompany-
ing documents listed below, are the originals, except
the docket entries, which are photostatic copies, filed
in this Court in the above entitled case and that they
constitute the record on appeal herein.

1. Petition for Removal
2. Notice of Removal
3. Notice and motion by defendants to dissolve in-
junction
4. Affidavit of Kenneth N. Silbert
5. Removal bond by defendants in the sum of
\$250.00

6. Amended petition for removal by defendants
7. Order shortening time for hearing of motion to dissolve temporary restraining order
8. Notice of related cases by defendants
9. Notice of motion by plaintiffs and motion to remand action to Superior Court State of California, County of Alameda with supporting papers attached
10. Affidavit of George J. Tichy, II
11. Order shortening time for hearing of motion to remand
12. Supplemental affidavit of George J. Tichy, II
13. Reassignment Order assigning action to Judge Zirpoli
14. Declaration of Byron T. Hawkins
15. Affidavit of Willis B. Court
16. Acknowledgment of service by Kenneth N. Silbert
17. Acknowledgment of service by Victor J. Van Bourg
18. Order denying motion to dissolve State Court Temporary Restraining Order
19. Motion by plaintiffs for Contempt Judgment with supporting papers attached
20. Order shorting time for hearing of motion for Contempt Judgment
21. Notice of Appeal by Defendants to 9th CCA
22. Affidavit of Richard Sarmento

23. Memorandum of points and authorities in support of Order of contempt
24. Certify copy of Order from 9th CCA staying payment of fine imposed upon appellant by District Court pending appeal
25. Bond for undertaking by defendant's in amount of \$50,000.00
26. Order approving bond for undertaking by defendants
27. Original of Reporter's Transcript of Dec. 2, 1970
28. Plaintiff's Exhibits: 1, 2, 3, 4, and 5
29. Docket Entries

In Witness Whereof, I have hereunto affixed my hand and the seal of the above entitled Court this 28th day of December 1970.

C. C. Evensen, Clerk
 By /s/ Theodore H. Kast
 Deputy Clerk

United States Court of Appeals
for the Ninth Circuit

No. 26838

Granny Goose Foods, Inc., a corporation,
and Sunshine Biscuits, Inc., a corpora-
tion.

Plaintiffs-Appellees,

vs.

Brotherhood of Teamsters & Auto Truck
Drivers, Local No. 70 of Alameda County,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers of
America,

Defendant-Appellant.

[Filed Jan. 18, 1973]

Appeal From the United States District Court
for the Northern District of California

Before: DUNIWAY, HUFSTEDLER, and TRASK,
Circuit Judges

HUFSTEDLER, Circuit Judge:

The Union appeals from an order holding it in criminal contempt for violating a temporary restraining order. We reverse because the order expired by operation of law after removal of the cause to the federal court and before the alleged contumacious conduct occurred.

Granny Goose Foods, Inc., and Sunshine Biscuits, Inc. ("Employers"), commenced the action in a California state court by filing a complaint charging the Union with breach of a collective bargaining agreement. It simultaneously filed an application for a temporary restraining order. On May 15, 1970, the state court, *ex parte*, issued a temporary restraining order and an order to show cause why a preliminary injunction should not be granted, made returnable on May 26, 1970. On May 18, 1970, Employers filed an amended complaint virtually identical to the original complaint except for the addition of new parties. On the same date the state court, *ex parte*, issued a modified temporary restraining order reflecting the change in parties and likewise modified the order to show cause, returnable May 26, 1970.

On May 19, 1970, the Union filed a petition to remove the action to the federal court. The following day it filed an amended petition to remove naming the new parties. Immediately after removal, the Union filed a motion to dissolve the temporary restraining order, noticed for May 22, 1970, a date within the life of the state order. Employers simultaneously filed a motion to remand, also noticed for May 22, 1970. Because the case was transferred from one federal judge to another, the motions were not heard until May 27, 1970. The district judge denied the motion to remand on May 27, and it submitted the motion to dissolve.

While the motion to dissolve was pending, the Supreme Court decided *Boys Markets, Inc. v. Retail*

Clerks Union (1970) 398 U.S. 235, a decision that destroyed the foundations of *Sinclair Refining Co. v. Atkinson* (1962) 370 U.S. 195, on which the Union's dissolution motion had been based. On June 4, 1970, the district court denied the motion to dissolve. There was no further action until the proceedings to obtain a contempt order were brought on December 1, 1970, charging the Union with violating the modified temporary restraining order by commencing strike and picketing activities against Employers on November 30, 1970. Employers never applied to the district court for a preliminary injunction. Contempt proceedings, begun on December 2, 1970, concluded with an adjudication of criminal contempt in which a substantial fine was imposed on the Union. This appeal followed.

If the action had been retained by the state court, the temporary restraining order would have expired by operation of law not later than 20 days after issuance of the modified order, *i.e.*, June 7, 1970 (Cal. Code Civ. Proc. § 527¹). If the restraining order had

¹Section 527 provides:

"An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. . . .

"No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of,

been initially granted by the federal district court, it would have expired not later than June 7, 1970, under the provisions of Rule 65(b) of the Federal Rules of Civil Procedure.²

but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. . . ."

We recognize that, under state law, the temporary restraining order would have expired on the specified return date, May 26, 1970. (*e.g.*, *Sharpe v. Brotzman* (1956) 145 Cal. App. 2d 354.) But we assume that the Union would have moved the state court to dissolve, as it did in the federal court, and that there would possibly have been continuances of the return date within the 20-day maximum permitted by statute.

²Rule 65(b) provides:

"A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be

Employers contend that the life of the temporary restraining order was indefinitely prolonged by the provisions of 28 U.S.C. § 1450: "All injunctions, orders, and other proceedings had in such [removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." The temporary restraining order was neither dissolved nor modified by the district court; therefore, it says, the order remained in full force and effect.

Section 1450 does not create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court. Section 1450 permits transfer to the federal court of state court restraining orders without any loss of potency during the trip. It adds nothing to the terms of state orders. The purpose of section

extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

For the purpose of this discussion we assume, *arguendo*, but we do not decide that Union's motion to dissolve was a consent to hold the matter in status quo until the motion could be decided and that it was, to that extent, a consent to an extension of the order within the exception to Rule 65(b).

1450 is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted. Employers' construction of section 1450 would offend the policy of California and federal policy imposing strict limitations on the longevity of temporary restraining orders. The temporary restraining order could not survive beyond June 7, 1970, the last day within its maximum state life, a date months before the alleged contumacious acts transpired.

If Employers wanted a preliminary injunction, they easily could have sought one. They did not do so. The Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate.

The order is Reversed and the contempt proceedings are vacated.

TRASK, Circuit Judge, dissenting:

The issue upon which this court is called to rule, is the effect of 28 U.S.C. § 1450 on the duration of a temporary restraining order issued by a state court in a case which is then removed to the federal court.

Had the case not been removed, the California Code of Civil Procedure would have caused such a temporary restraining order issued *ex parte* to be extinguished in a maximum of 20 days; had the same order been issued originally in the federal court, it would have ceased to exist in the same period of time.

When such a case, with an outstanding restraining order issued and pending, is removed, it becomes subject to 28 U.S.C. § 1450 which provides in pertinent part:

"All injunctions, orders, and other proceedings had in [a removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

The majority of the court is of the opinion that the purpose of this section is to "prevent a break" in the continuity of a restraining order that "could otherwise occur" during the change from state to federal court. It would seem that if such were the purpose, the statute could have very simply said so. Or, the Congress could have provided that the restraint should not in any event continue in effect for a greater period of time than that provided by the state statute or the state court's order. It did not. It provided very simply, but very clearly, that all injunctions should remain in full force and effect "until dissolved or modified by the district court." It thus requires affirmative action on the part of one of the parties before it may be dissolved or modified. And if the district court refuses to dissolve it, the temporary restraining order issued *ex parte* remains in force until the case is tried on its merits and the temporary injunction or permanent injunction is granted or denied.

In this case the pleadings disclose that the employers, as plaintiffs, filed a complaint and then an amended complaint seeking relief against the defen-

dant Union's alleged unlawful interference with its activities. The complaint sought a permanent injunction. It also asked for a temporary restraining order pending a hearing on an order to show cause and that a preliminary injunction be granted upon the hearing of the order to show cause to continue during the pendency of the action. The action was removed to federal court before the return date of the order to show cause in the state court. But the Union promptly filed a motion in federal court to dissolve the temporary restraining order and caused the motion to be brought to a hearing. The motion to dissolve was denied upon that hearing leaving the order of restraint against the Union in full force and effect. At this point the case was in exactly the same posture as it would have been had the order to show cause been heard and the preliminary injunction granted on that order pending a trial on the merits of the permanent relief. The temporary restraining order had been disposed of by hearing and decision. The order continuing the restraint was, in effect, a preliminary injunction pending a hearing on the merits. *Morning Telegraph v. Powers*, 450 F.2d 97, 99 (2nd Cir. 1971), cert. denied, 405 U.S. 954 (1972); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970), cert. denied, 401 U.S. 939 (1971). *Morning Telegraph, supra*, points out that in applying the distinction between a temporary restraining order and a preliminary injunction,

"... the label put on the order by the trial court is not decisive." Wright, *Federal Courts* 459 (2d ed. 1970), quoted with approval in *Belnap v.*

Leary, 427 F.2d 496, 498 (2d Cir. 1970). Here, the practical effect of the refusal to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief. *Peabody Coal Co. v. Barnes*, 308 F.Supp. 902 (E.D. Mo. 1969)." 450 F.2d at 99.

In *Peabody Coal Co. v. Barnes*, *supra*, the district court said, "[u]nder Section 1450, 28 U.S.C., the temporary restraining order issued by the state court remains in full force and effect after the removal until and unless dissolved by this Court." 308 F.Supp. at 903. In that case the temporary restraining order issued without notice remained in effect some two and one-half months without a request for a hearing.

Indeed, the California courts appear to follow the same reasoning. In *Gray v. Bybee*, 60 Cal. App. 2d 564, 141 P.2d 32, 35 (1943), the court said:

"The granting or denial of a temporary restraining order is discretionary with the trial judge (14 Cal.Jur 180, sec. 7) and amounts to a mere preliminary or interlocutory order to keep the subject of litigation in status quo pending the determination of the action on its merits. *People v. Black's Food Store*, 16 Cal.2d 59, 105 P.2d 361, 362; 14 Cal.Jur. 180, sec. 9."

It is asserted here that if the employers had wanted a preliminary injunction they could easily have sought one. They did seek one in their pleadings. After the trial court denied the motion to dissolve there was no reason for the employers to take the initiative. The restraint they sought had been ob-

tained. Had the Union desired to litigate the merits of the trial court's refusal to dissolve the temporary restraining order, the Union could easily have done so, either by an appeal from the trial court's order, treating it as the grant of a preliminary injunction, see *Morning Telegraph v. Powers*, *supra*, or by bringing the case on for trial on the merits. It did neither.

The argument that to construe Section 1450 according to its plain language would somehow offend the policy of California and, therefore, the California time limitation should control, is difficult to follow. It is well established that once a case is removed from state court to federal court, questions of procedure are governed by federal law and not state law. For instance, the time in which to file an amended complaint is governed by federal law and not state law.

Mr. Justice Douglas said in *Freeman v. Bee Machine Co.*, 319 U.S. 448, 452 (1943):

"The jurisdiction exercised on removal is original not appellate. *Virginia v. Rives*, 100 U.S. 313, 320. The forms and modes or proceeding are governed by federal law. *Thompson v. Railroad Companies*, 6 Wall. 134; *Hurt v. Hollingsworth*, 100 U.S. 100; *West v. Smith*, 101 U.S. 263; *King v. Worthington*, 104 U.S. 44; *Ex parte Fisk*, 113 U.S. 713; *Northern Pacific R. Co. v. Paine*, 119 U.S. 561; *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684; *Rorick v. Devon Syndicate*, 307 U.S. 299."

Similarly, where a conflict exists between state rule and federal rule as to service of process in a diversity jurisdiction case, the federal rule applies. *Hanna v.*

Plumer, 390 U.S. 460 (1965). See also, *Seal v. Industrial Electric, Inc.*, 362 F.2d 788 (5th Cir. 1966). A federal court was not limited by a state 30-day rule to set aside a default judgment. *Munsey v. Testworth Laboratories, Inc.*, 227 F.2d 902, 903 (6th Cir. 1955).

So, in this case I would hold that Section 1450 protects the restraining order during its removal trip and preserves it as it reaches its destination in the federal court. At that point federal procedural and statutory rules take control. Rule 65(b) Fed. R. Civ. P. would prevail over the state rule as to termination, and the "clear statutory command [of Section 1450] must take precedence over the arguably contrary rule of procedure [of rule 65(b)]." *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970).

I would therefore conclude that the temporary restraining order continued in existence as a preliminary injunction after hearing by the district court and its denial of the motion to dissolve the restraint. The order of contempt was not clearly erroneous and the judgment of the trial court should be affirmed.

/s/ Ozell M. Trask
United States Circuit Judge

United States Court of Appeals
for the Ninth Circuit

No. 26838

Granny Goose Foods, Inc., a corporation,
Sunshine Biscuits, Inc., a corporation,
Standard Brands, Inc., a corporation,
Plaintiffs-Appellees,

vs.

Brotherhood of Teamsters & Auto Truck
Drivers, Local No. 70 of Alameda County,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers of
America,
Defendant-Appellant.

[Filed Feb. 22, 1973]

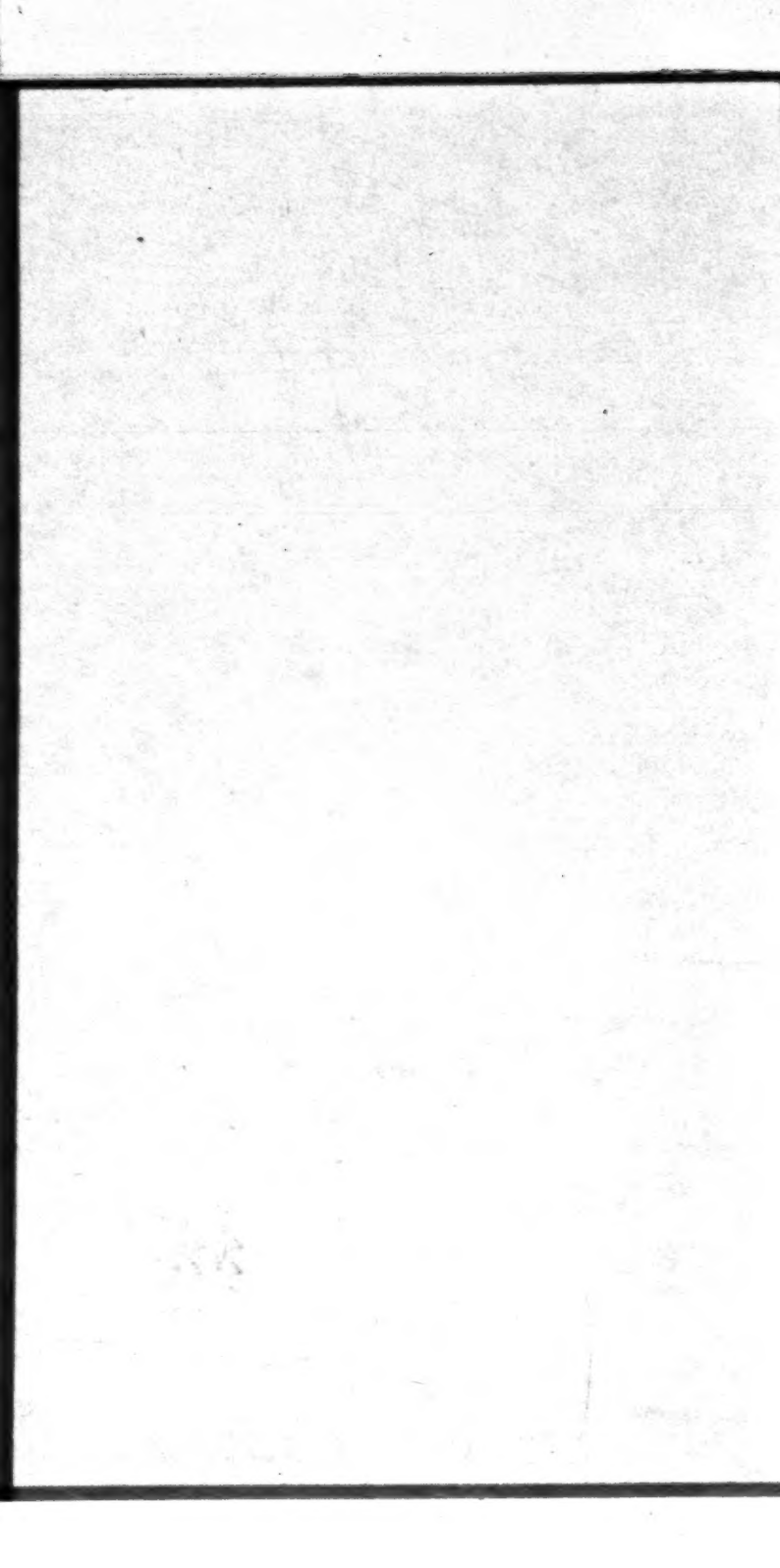
ORDER

Before: DUNIWAY, HUFSTEDLER, and TRASK,
Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.



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In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1973

No. 72-1566

**GRANNY GOOSE FOODS, INC., a corporation, SUNSHINE
BISCUITS, INC., a corporation, and STANDARD
BRANDS, INC., a corporation,
*Petitioners,***

vs.

**BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
*Respondent.***

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Opinion of the Court of Appeals (R. 112-122)¹ is reported at 472 F.2d 764. The Order and Judgment

¹"R." references are to the Single Appendix.

of Criminal Contempt of the District Court (R. 90-97) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered January 18, 1973 (R. 112). The petition for a writ of certiorari was filed on May 22, 1973, and was granted October 9, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254(1). Federal jurisdiction was initially invoked herein under 29 U.S.C. §185 by the removal of this case from the Superior Court of the State of California to the United States District Court for the Northern District of California.

QUESTIONS PRESENTED

1. Where a conflict exists between state law and the federal removal statute concerning the effective period of a state court temporary restraining order, which law should apply in determining the effective period of such restraining order after removal of the underlying action to federal court?

2. Where a conflict exists between the Federal Rules of Civil Procedure and the federal removal statute concerning the effective period of a state court order issued prior to removal, which law or rule should apply in determining the effective period of a restraining order after removal of the underlying action to federal court?

3. Does the denial by the district court, after hearing, of a motion to dissolve a removed temporary restraining order constitute the issuance of a preliminary injunction within the meaning of the Federal Rules of Civil Procedure for purposes of enforcement by contempt judgment?

STATUTORY PROVISIONS INVOLVED

Title 28, Section 1450, of the United States Code (1970), provides as follows:

"Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State Court.

"All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." [Emphasis added.]

This case also involves 28 U.S.C. §2071, Rules 65(b) and 81(c) of the Federal Rules of Civil Procedure

and Section 527 of the California Code of Civil Procedure, all of which are set forth in the Appendix hereto.

PROCEEDINGS BELOW

A. The proceeding in the Superior Court.

On May 15, 1970, Petitioners Granny Goose Foods, Inc., and Sunshine Biscuits, Inc., sought and obtained a Temporary Restraining Order and Order to Show Cause in the Superior Court of the State of California for the County of Alameda against picketing and work stoppages induced by Respondent (the "Union") at said Petitioners' Alameda County facilities. Petitioners contended that Respondent's strike and picketing activities breached the no-strike and grievance provisions of the collective bargaining agreement then in effect between Petitioners and the Union (R. 10-12). The Temporary Restraining Order and Order to Show Cause were issued in the presence of the Union's counsel and over his vigorous opposition (R. 47-48). An Amended Complaint was filed on May 18, 1970, after telephone notice to the Union's counsel (R. 49). The Amended Complaint named Petitioner Standard Brands, Inc., as an additional party plaintiff and added a party defendant but reiterated the same allegations and prayer for relief (R. 1-10).² On the same day, the Superior Court issued a Modified Temporary Restraining Order extending the coverage of the original order to the parties named

²The Petitioners are hereinafter referred to as the "Employers".

in the Amended Complaint and a Show Cause Order with a return date of May 26, 1970 (R. 13-15).

The following day, May 19, 1970, the Union and individual Union officer and agent defendants filed a Petition for Removal of the case from state to federal court on the ground that the action arose under 29 U.S.C. §185 (R. 16-21). The Petition was amended on May 20, 1970, to include the Amended Complaint for injunction (R. 21-23). The case was thereupon removed to the United States District Court for the Northern District of California.

B. Proceedings in the district court immediately following removal.

Once the case had been removed to the district court, the Union and the other named defendants moved to dissolve the Temporary Restraining Order on the alleged ground that Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104) prohibited the federal court from maintaining the order in effect (R. 26-30). Immediately thereafter the Employers filed a Motion to Remand (R. 33-47).

The Motions to Dissolve and to Remand were heard on May 27, 1970. At the hearing the court denied the Motion to Remand and took the Motion to Dissolve under submission. On June 4, the court issued its order denying the Motion to Dissolve, relying on this Court's landmark decision in *The Boys Market, Inc. v. Retail Clerks' Union*, 398 U.S. 235 (1970) (R. 50-51). Thereafter the Union took no other action to dissolve the Modified Temporary Restraining Order or otherwise to seek further hearings to set aside that Order.

C. The contempt proceeding in the district court.

On December 1, 1970, the Employers filed a Motion for Contempt Judgment, alleging that since on or about November 30, 1970, the Union had, *inter alia*, engaged in picketing and directed work stoppages at the Employers' Bay Area facilities, in defiance of the Modified Temporary Restraining Order issued by the Superior Court of Alameda County and continued in effect after removal to the district court (R. 51-82).

The hearing on the Employers' Motion for Contempt Judgment was held on December 2, 1970. At the conclusion of the hearing the court adjudged the Union in willful contempt of an Order of the court which remained in full force and effect by reason of the provisions of the federal removal statute, 28 U.S.C. §1450 (R. 90-97).

D. The decision of the Court of Appeals.

A divided Court of Appeals reversed, two to one, the district court's judgment of contempt and vacated the contempt proceedings. In so doing, the Court majority held that the Modified Temporary Restraining Order issued by the state court could not, even after its removal to federal court, survive beyond June 7, 1970, the date which the Court considered to be the injunction's last effective date under California law.³ The dissent objected to the majority's failure to

³The majority read California law as limiting the duration of a temporary restraining order to a mere 20 days. In fact, Section 527 of the California Code of Civil Procedure (Appendix, *infra*) expressly permits the continuance of a temporary restraining order for "a reasonable period" beyond 15 or 20 days as a matter of course to allow the defendant to meet the application for a preliminary

give effect to the plain language of 28 U.S.C. §1450. The dissent also pointed out the majority's failure even to consider the decisions of other Circuits unanimously holding that a state court temporary restraining order remains in effect in federal court regardless of state law, and regardless of any time limitations imposed by Rule 65(b) of the Federal Rules of Civil Procedure until it is dissolved by the federal court. *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *General Elec. Co. v. Local Union 191*, 413 F.2d 964, 966 (5th Cir. 1969), *vacated and remanded on other grounds*, 398 U.S. 436 (1970); *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).⁴

SUMMARY OF ARGUMENT

Title 28, Section 1450, of the United States Code provides in plain, unambiguous language that after removal of a case from state to federal court, all state orders continue in effect until *the federal court* modifies or dissolves them. The Court of Appeals majority ignored this plain language and instead sought to limit the duration of such removed orders by refer-

injunction. Furthermore, a temporary restraining order under California law may be continued in effect beyond such period by stipulation of the parties, or "when the necessary business of the court prevents it from hearing the matter within that time." *McDonald v. Superior Court*, 18 Cal.App.2d 652, 657 (1937). Thus, state policy is *not* to impose an automatic termination date on temporary restraining orders in every case.

⁴None of these cases was distinguished or dealt with by the majority in any respect.

ence to the majority's interpretation of state law. The majority's decision does violence to the specific provision enacted by Congress. Furthermore, that decision totally ignores the unanimous decisions of other Courts of Appeals holding that a removed state court order does not expire automatically but remains in effect until the federal court acts to dissolve or modify it, even though the order would have expired automatically under state law had the case not been removed.

The Court of Appeals majority also concluded that Rule 65(b) of the Federal Rules of Civil Procedure limits the duration of removed state orders. But a general procedural rule such as Rule 65(b) cannot, under federal law or the rules of statutory construction, abrogate a conflicting Act of Congress narrowly and specifically addressed to the duration of *removed* orders.

The purpose imputed to Congress by the Court of Appeals majority to support the majority's reading of Section 1450 has absolutely no basis in the legislative history of the statute. Congress at no time indicated that the statute was intended merely to "prevent a break"² in the effectiveness of a state court order during the removal process. At no time did Congress indicate that after removal, the order expires on the expiration date set by state law. On the contrary, the history of Section 1450 demonstrates that Congress has never qualified Section 1450 or its predecessor statutes by reference to state law or to

²Opinion of the Court of Appeals, R. 116-117.

federal procedural rules regarding the duration of injunctive or other orders.

Finally, even assuming, *arguendo*, that the time limits set forth in Rule 65(b) of the Federal Rules of Civil Procedure applied to removed injunctive orders, those limits would apply only to *ex parte* orders. They would not apply to orders granted, as here, with both parties on notice and present in court. Nor would Rule 65(b) apply to an injunctive order after the district court has heard and denied a motion to dissolve that order. The denial of such a motion, according to the weight of federal judicial authority, converts the order into a preliminary injunction.

ARGUMENT

I

THE PLAIN MEANING OF SECTION 1450 IS THAT INJUNCTIONS AND OTHER ORDERS REMAIN IN EFFECT AFTER REMOVAL OF THE CASE, REGARDLESS OF LIMITATIONS UNDER STATE LAW, UNTIL THE FEDERAL DISTRICT COURT DISSOLVES OR MODIFIES THE ORDER.

A. The language of the statute.

The language of Section 1450 relating to the duration of injunctive orders is plain and unqualified: *All state court orders are to remain in full force and effect in federal court after removal. Only if the federal court dissolves or modifies such a removed order does it cease to be effective.*

The majority opinion in the Court of Appeals disregards the plain and unqualified language of Section 1450 regarding the duration of injunctive orders. The majority decided that Section 1450 serves merely to

"prevent a break" in the effectiveness of an existing state order upon its removal to federal court, so that such order does not expire before the date when it would otherwise have expired in state court.⁶ According to the analysis of the majority, a removed order continues to be subject to state law and policy. Therefore, the duration of a removed order in federal court is no greater than it is under state law.

The statute itself does not support such a construction of the law. The provision of Section 1450 in question here makes no reference to state law or policy. Rather, it provides that a removed order shall expire only in the event that the federal court dissolves it. Where, as here, the language of a statute is unambiguous, its plain meaning must be given effect. *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934); *Thompson v. United States*, 246 U.S. 547 (1918); *Adams Exp. Co. v. Kentucky*, 238 U.S. 190 (1915).

The intent of Congress in enacting a particular statutory provision may frequently be deduced by comparing that provision with another part of the same statute. *White v. United States*, 305 U.S. 281 (1938); *Hellmich v. Hellman*, 276 U.S. 233 (1928). Congress drafted the provision of Section 1450 regarding attachments and sequestrations to defer to state law.

⁶The Ninth Circuit majority offers no authority for its novel interpretation of Section 1450. By referring to limitations allegedly imposed by state law, the Court of Appeals majority raises a false issue to divert attention from the plain language of Section 1450. In fact, as noted at n. 3, *supra*, California law does not establish an inflexible automatic expiration date for temporary restraining orders.

In contrast, *Congress prescribed in absolute terms, without reference to extrinsic law or policy, the duration of all injunctions and orders removed to federal court.* Had Congress intended to defer to state policy regarding the duration of orders, it would have been a simple matter to draft Section 1450 to accomplish that purpose. Its failure to do so justifies the conclusion that Congress did not intend state law to limit the duration of removed injunctions and orders. *Jerome v. United States*, 318 U.S. 101, 104 (1943).

B. The case law.

Several recent decisions in Circuits other than the Ninth Circuit consider the effect of Section 1450 on temporary restraining orders in cases removed to federal court. All of these decisions in other Circuits interpret Section 1450 differently from the Ninth Circuit. In each case the other Circuits have determined that Section 1450 precludes the automatic termination of a removed order. Thus, in *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971), the Sixth Circuit rejected the contention that a temporary restraining order granted by a state court in a case subsequently removed to federal court expired no later than ten days after the removal petition was filed, pursuant to Rules 81(c) and 65(b) of the Federal Rules of Civil Procedure. Referring to Section 1450, the Court held as follows at *Appalachian Volunteers, Inc. v. Clark*, *supra*, at 533:

"This clear statutory command must take precedence over the arguably contrary rule of proce-

ture, and it would seem to *preclude the automatic termination* of the temporary restraining order obtained in the state court." [Emphasis added.]

In an earlier case the same Circuit ruled that by reason of Section 1450, affirmative action by the federal court in the form of a dissolution order is required to render a state court order ineffective after removal. *Munsey v. Testworth Laboratories*, 227 F.2d 902, 903 (6th Cir. 1955).

The Second Circuit reached the same conclusion concerning the effect of Section 1450 in *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972). In that case, the *Morning Telegraph* had obtained an *ex parte* temporary restraining order⁷ against the defendant union in state court. The Second Circuit said in dicta that the "restraint was to continue in effect until a hearing scheduled for March 3, 1971, but was extended automatically by 28 U.S.C. §1450 [footnote omitted] when removed by the Union to the federal district court * * *." *Morning Telegraph v. Powers, supra*, 450 F.2d at 98.

District courts in other Circuits have likewise consistently held that a removed order does not expire automatically, but continues in effect unless it is dissolved by the federal court. In *Peabody Coal Co. v. Barnes*, 308 F.Supp. 902, 903 (E.D. Mo. 1969), the Court held that:

⁷In the instant case the state order was not granted *ex parte*. The Union's counsel was notified of the complaint and appeared in court to protest the restraining order vigorously (R. 47-49).

"Under Section 1450, 28 U.S.C., the temporary restraining order issued by the state court remains in full force and effect after the removal *until and unless dissolved by this Court.*" [Emphasis added.]

In that case the Court ruled that Section 1450, not Rule 65(b), applied to the removed order. As a result, a temporary restraining order issued by a state court remained in effect *two and a half months* after its removal to the district court, until the district court dissolved it.

In *The Herald Co. v. Hopkins*, 325 F.Supp. 1232 (E.D.N.Y. 1971), the defendant union removed the underlying action to federal court after the plaintiff obtained a temporary restraining order against the defendant's strike and work slowdown. Defendant then moved to vacate the state court order. In ruling on the motion, the district court stated in dicta (*The Herald Co.*, *supra*, 325 F.Supp. at 1233):

"Of course, under 28 U.S.C. §1450, the State restraining order has remained in effect pending consideration of the motions and rendering of this decision."

In all of the above decisions applying and construing Section 1450, the courts concluded that a removed state order *does not* expire automatically on its termination date under state law, nor ten days after its removal under Rule 65(b). *Without exception, the courts of other Circuits have determined that only dissolution by the federal court terminates such a state court order.*

C. Federal policy.

The majority opinion's deference in the instant case to state law and policy regarding the duration of restraining orders not only contravenes the language of Section 1450 and existing authorities construing that statute but also ignores the established rule that state law has no application to questions of procedure once a case has been removed to federal court. Such questions are governed by federal law, *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Hanna v. Plumer*, 380 U.S. 460 (1965).

The federal courts, adhering to the foregoing decisions of this Court, have treated questions of time limitations on court orders and proceedings as procedural, and have looked to federal law to resolve them. Thus, in *Munsey v. Testworth Laboratories, supra*, the Sixth Circuit held that a default judgment rendered by a state court prior to removal was subject to being set aside by the federal court after removal, just as it would have been in state court before removal. But federal, not state, law determined the *time* in which the court was required to act to set aside the judgment. Similarly, federal law controls the time in which a motion to set aside a state court order after its removal to federal court must be made. *Butner v. Neustadter*, 324 F.2d 783, 785-786 (9th Cir. 1963).

By parity of reasoning, the duration of a restraining order is a procedural matter governed by federal law, even though the choice of that law affects the outcome of the case. In the instant case, the duration of the restraining order after its removal to federal court

was such a matter of procedure. Federal law thus determined the question of how long that order remained in effect. Contrary to the majority opinion in the instant case, state law could have no part in the determination of that question.

II

THE UNAMBIGUOUS PROVISION OF SECTION 1450 GOVERNING THE DURATION OF REMOVED ORDERS MUST PREVAIL OVER FEDERAL RULE 65(b).

As demonstrated above, Section 1450 precludes the automatic termination of state court orders following removal of the case to federal court. According to the statute, removed orders remain in full force and effect until the federal court dissolves or modifies them. The majority decision of the Ninth Circuit in the instant case, however, would subject removed restraining orders to the time limits prescribed by Rule 65(b) of the Federal Rules of Civil Procedure for temporary restraining orders issued *ex parte*. Rule 65(b) provides that a temporary restraining order shall expire within ten days of the date the order is entered, a limitation patently inconsistent with the language of Section 1450.

The conclusion that Rule 65(b) limits the duration of removed orders contravenes federal law. It is true that Rule 81(c) of the Federal Rules provides in general terms that "These rules [Federal Rules of Civil Procedure] apply to civil actions removed to the United States district courts from the state courts

and govern procedure after removal." However, in 28 U.S.C. §2071 (1970), Congress expressly provided that federal rules of court shall be consistent with Acts of Congress:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. *Such rules shall be consistent with Acts of Congress* and rules of practice and procedure prescribed by the Supreme Court." [Emphasis added.]

See, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1940); *Beers v. Haughton*, 9 Pet. 329 (1835).

Rule 81(c), to the extent that it arguably makes removed injunctive orders subject to the time limitation prescribed by Rule 65(b), is *not* consistent with Section 1450, a specific Act of Congress on that subject. Therefore, the Federal Rules are ineffective to narrow the unqualified provision of Section 1450 respecting the duration of removed orders.

Furthermore, Section 1450 is addressed specifically to the question of the duration of orders in removed cases, while Rule 65(b) is not so limited. To subject restraining orders in removed cases to the provisions of Rule 65(b) would be to diminish the unqualified language of Section 1450, contrary to the rules of statutory construction. In *Bondurant v. Watson*, 103 U.S. 281 (1881), a case involving the interpretation of a predecessor statute to Section 1450, this Court ruled that:

"It would not be according to the well settled rules of statutory construction to import an exception into this statute [predecessor to Section 1450] from a prior one on a different subject [the federal statute which forbade a federal court from staying state court proceedings]."

Section 1450, not Rule 65(b), therefore applies to removed state court restraining orders and continues such orders in effect until dissolved by the federal court. *Peabody Coal Company v. Barnes*, 308 F.Supp. 902 (E.D. Mo. 1969).

The courts have long recognized that different rules may apply to removed and nonremoved cases heard in federal court. Thus, in *Eureka & K. R.R. Co. v. California & N. Ry. Co.*, 103 F. 987 (C.C. Cal. 1900), *aff'd*, 109 F. 509, the circuit court held that a federal law prohibiting a federal court from enjoining a state court proceeding applied to actions commenced in federal court but not to actions removed there. The latter were governed by the Act of March 3, 1875, c. 137, §4, 18 Stat. 470, predecessor statute to Section 1450.

Even assuming, *arguendo*, that Rule 65(b) is applicable to removed orders, that Rule by its terms applies only to temporary restraining orders granted *without notice*. However, the Union did have prior notice when the Employers filed their original and amended complaints, and the Union was represented in court when Judge Lercara issued his order of May 15. Where notice of the application for a tempo-

rary restraining order is given to the opposing party, the order becomes in effect a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965); *Pan American World Air. v. Flight Eng. Intern. Assoc.*, 306 F.2d 840 (2d Cir. 1962); *Sims v. Greene*, 160 F.2d 512 (3d Cir. 1947). The order ceases to be subject to the ten-day limitation of Rule 65(b):

"If the opposing party has notice of the application for a temporary restraining order, such order does not differ functionally from a preliminary injunction and is subject to no special procedural requirements."

3 Barron & Holtzoff, *Federal Practice and Procedure* §1432 (1961). See also, *Dilworth v. Riner*, *supra*, at 229.

Moreover, Rule 65(b) does not apply where the party enjoined has had a hearing on the facts pertinent to a decision on the motion. *Miami Beach Fed. Sav. & Loan Assoc. v. Callander*, 256 F.2d 410 (5th Cir. 1958). The Union had an opportunity to argue the facts when it appeared in the district court on May 27, 1970, and moved to dissolve the Modified Temporary Restraining Order. At that time the district court took the Union's motion under careful consideration and ultimately denied it. Whether or not the Union exhausted the possible legal grounds for its motion is not controlling. It is important that the Union had the opportunity to raise them. See, *Carpenters' District Council, etc. v. Cicci*, 261 F.2d 5, 8 (6th Cir. 1958).

For the foregoing reasons, the ten-day limitation of Rule 65(b) is inapplicable to the removed temporary restraining order in the instant case, and that order remained in effect.

III

THE HISTORICAL EVOLUTION OF THE LANGUAGE OF SECTION 1450 DEMONSTRATES THAT THE EFFECTIVE DURATION OF INJUNCTIONS AND ORDERS AFTER REMOVAL OF THE CASE IS NOT LIMITED BY STATE LAW OR FEDERAL PROCEDURAL RULES.

There is no recorded Congressional debate or comment on Section 1450 or its antecedents to show how Congress intended the language relating to the duration of injunctions to be interpreted. However, the historical development of that provision does demonstrate that Congress never limited the duration of removed injunctions and orders to time limits set forth in state law or federal procedural rules governing actions originating in federal court. Rather, essentially the same language governing removed injunctions and orders was enacted and re-enacted by Congress over a period of more than one hundred years.

Section 1450 carries over the exact language of 28 U.S.C. §79 (1940 ed.) That language was derived from the Act of March 3, 1911, c. 231, §36, 36 Stat. 1098,*

*The Act of March 3, 1911, provided that:

"When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same

and the Act of March 3, 1875, c. 137, §4, 18 Stat. 470.^o
 The first statutory provision for the disposition of an

manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." 36 Stat. 1098.

See Conference Report of the Special Joint Committee on Revision and Codification of the Laws of the United States on S. 7031 relative to revision and codification of laws relating to the judiciary, March 1, 1911, S. Rep. No. 388, 61st Cong., 2d Sess. Part 1 of the Report contains an explanatory statement of each section of the bill. Regarding Section 36, the Report merely notes the derivation of the section from the Act of March 3, 1875, *supra*, and Title XII, c. 7, §646 of the Revised Statutes, with two changes in language: the deletion of the word "and" at the beginning of the last sentence, and the substitution of "district court" for "circuit court".

^oThe Act of March 3, 1875, c. 137, §4, *supra*, provided as follows:

"Section 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." 18 Stat. 470. [Emphasis added.]

Section 4, Chapter 137, of the Act of March 3, 1875, superseded Title XII, c. 7, §646, of the Revised Statutes, which provided that

"Sec. 646. When a suit is removed for trial from a State court to a circuit court, as provided in the foregoing sections, any attachment of the goods or estate of the defendant by the original process shall hold the same to answer the final judgment, in the same manner as by the laws of such State they would have been held to answer final judgment had it been rendered by the court in which the suit was commenced; and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into

injunction granted by the state court after removal of the underlying cause to federal court was made in the Act of July 27, 1866, entitled, "An Act for the Removal of Causes in certain cases from State Courts," c. 288, 14 Stat. 306. That Act provided, *inter alia*, that where removal of an action from state to federal court was effected according to its provisions,

"... [A]ny attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment, in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered by the court in which the suit commenced; and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into which the cause shall be removed; and any bond of indemnity or other obligation given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process against the defendant petitioning for the removal of the cause, shall also continue in full force and may be prosecuted by the defendant and made available for

which the cause is removed; and any bond of indemnity or other obligation, given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process, against the defendant petitioning for the removal of the cause, shall also continue in full force and may be prosecuted by the defendant and made available for his indemnity in case the attachment, injunction, or other restraining process be set aside or dissolved, or judgment be rendered in his favor, in the same manner, and with the same effect as if such attachment, injunction, or other restraining process had been granted, and such bond had been originally filed or given in such State court." [Emphasis added.]

his indemnity in case the injunction, attachment, or other restraining process be set aside or dissolved, or judgment rendered in his favor in the same manner and with the same force and effect as if such injunction, attachment, or restraining process had been granted, and such bond had been originally filed or given in the court to which the cause is removed." 14 Stat. 306. [Emphasis added.]¹⁰

In none of these antecedent statutes did Congress tie the duration of an injunction after removal of the case to state law or state procedural rules. This treatment contrasts with the treatment of attachment of a defendant's goods or estate and with the treatment of indemnity bonds. In all of these removal statutes, as in the present law, Section 1450, post-removal treatment of an *attachment* effected in the state court was expressly made dependent on the provisions of state law. By the Act of July 27, 1866, *supra*, 14 Stat. 306, and by various earlier statutes,¹¹ Congress al-

¹⁰These provisions of the Act of July 27, 1866, were incorporated in the Act of July 27, 1868, c. 253, §2, 15 Stat. 227, and in the amendatory Act of March 2, 1867, c. 146, 14 Stat. 558.

¹¹Act of March 3, 1911, c. 231, §36, 36 Stat. 1098;

Act of March 3, 1875, c. 137, §4, 18 Stat. 470;

Act of July 27, 1866, 14 Stat. 306.

For earlier removal statutes, consistently deferring to state law regarding attachment, see:

Act of September 24, 1789, c. 20, §12, 1 Stat. 73;

Act of March 2, 1833, c. 57, §3, 4 Stat. 632;

Act of March 3, 1863, c. 91, §5, 12 Stat. 755;

Act of April 9, 1866, c. 31, §3, 14 Stat. 27;

Act of May 11, 1866, c. 80, §3, 14 Stat. 46;

Act of July 13, 1866, c. 184, §67, 14 Stat. 98;

Act of February 5, 1867, c. 27, 14 Stat. 385; and

Act of February 28, 1871, c. 99, §16, 16 Stat. 433.

lowed the defendant to recover on an indemnity bond to the degree that he would have been able to do so had the action commenced in federal court. Congress applied *neither* limitation to the clause of the removal statute regarding the post-removal disposition of an injunction issued by the state court. With some minor changes in phraseology, Congress has consistently provided that such injunctions "shall continue in force until modified or dissolved by the United States court into which the cause shall be removed . . ."¹² Had Congress intended to limit the duration of such an injunction to state law or federal procedural rules, it had at its disposal the language to do so. But Congress made no such limitation.

Thus, the intent imputed to Congress by the Court of Appeals majority to support their reading of Section 1450 has absolutely no basis in the legislative history of the statute. There is nothing in that history to suggest that Congress, by enacting Section 1450, intended only to "prevent a break" during removal in the effective period of a restraining order as prescribed by state law.

Moreover, where the legislative history fails to explain the intent of Congress, it is improper to adopt an interpretation not suggested by the plain language of the statute. *Segal v. Rochelle*, 382 U.S. 375, 383 (1966) ("* * * [A]n uncertain guess at Congress' intent provides dubious ground for disregarding its plain language."). Furthermore, even if illuminating

¹²14 Stat. 306.

legislative comment or debate were available, the language of the statute itself would remain the foremost guide to legislative intention. See, *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940), *reh. denied*, 311 U.S. 724, where this Court articulated the following principle:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislature. In such cases we have followed their plain meaning."

IV

THE DISTRICT COURT'S DENIAL OF THE UNION'S MOTION TO DISSOLVE THE REMOVED TEMPORARY RESTRAINING ORDER CONSTITUTED THE GRANTING OF A PRELIMINARY INJUNCTION.

Even apart from the operation of Section 1450, the Employers' removed restraining order did not expire within the time limits prescribed in Rule 65(b) but continued in full force and effect. The district court's denial of the Union's motion to dissolve the order effectively converted the restraining order into a preliminary injunction. See, *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *General Elec. Co. v. Local Union 191*, 413 F.2d 964 (5th Cir. 1969), *vacated and remanded on*

other grounds, 398 U.S. 436 (1970); *Peabody Coal Co. v. Barnes*, 308 F.Supp. 902 (E.D. Mo. 1969).

The distinction between a temporary restraining order and a preliminary injunction lies in the necessity of notice to the adverse party before a preliminary injunction may issue. See, Rule 65(a)(1), Fed. R.Civ.P. The party opposing a preliminary injunction must have an opportunity to present evidence and argument in his own behalf at a hearing. 7 Moore, *Federal Practice* ¶65.04[3] (1972). *Marshall Derbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 359 (5th Cir. 1971); *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Co.*, 443 F.2d 867 (2d Cir. 1971); *Consolidated Coal Co. v. Disabled Miners of So. W. Va.*, 442 F.2d 1261 (4th Cir. 1971), *cert. denied*, 404 U.S. 911 (1971); *Cerutti, Inc. v. McCrory Corp.*, 438 F.2d 281 (2d Cir. 1971); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541 (9th Cir. 1969).

These safeguards of notice and a hearing at which both sides have the opportunity to present evidence and argument operate whether the hearing is convened on the plaintiff's application for a preliminary injunction or on the defendant's motion to dissolve a yet unexpired temporary restraining order.

In *Morning Telegraph v. Powers*, *supra*, the union filed three motions to vacate a removed temporary restraining order which was still in effect by force of Section 1450. The motions were denied. The Second Circuit, ruling that the lower court's orders were

appealable, held as follows at *Morning Telegraph v. Powers, supra*, 458 F.2d at 99:

"* * * [T]he practical effect of the refusal [of the district court] to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief. [Citation omitted.]"

The court reasoned that the union had been heard on the merits of preliminary relief each time that it presented its motion to dissolve the restraining order.

The Fifth Circuit, in *General Elec. Co. v. Local Union 191, supra*, held that the court below properly granted the defendant's motion to dissolve a state court temporary restraining order after removal of the case. Citing Section 1450, the Court declared that (*General Elec. Co. v. Local Union 191, supra*, 413 F.2d at 966):

"We are of the view that the District Court did not err in dissolving the injunction * * * because, in our view, once this case was removed, a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal court * * *." [Emphasis added.]

See also, *Appalachian Volunteers, Inc. v. Clark, supra*; *Peabody Coal Co. v. Barnes, supra*.

The Court of Appeals majority held in this case that the district court's denial of the Union's motion to dissolve the state court restraining order did not constitute the granting of a preliminary injunction. The majority's decision ignored both the contrary authority of other Circuits and the practical and legal

bases for distinguishing between temporary restraining orders and preliminary injunctions.

Here, the Union had an opportunity to be heard on the merits of the restraining order when it moved in federal district court to dissolve the removed injunctive order. The district court took the motion under submission and duly denied it. As the Court of Appeals dissent observed, there was then no effective distinction in the posture of the case from the situation where a preliminary injunction is granted pending trial on the merits.

CONCLUSION

On the basis of the foregoing analysis, it is respectfully submitted that the judgment of the court below should be reversed.

Dated, San Francisco, California,
November 21, 1973.

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(Appendix Follows)

Appendix

Title 28, Section 2071, of the United States Code (1970), provides as follows:

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

Rule 65(b) of the Federal Rules of Civil Procedure provides as follows:

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the

order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Rule 81(c) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. * * *

Section 527 of the California Code of Civil Procedure (West 1971) provides in pertinent part as follows:

* * *

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted with-

out notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 [1] *days or, if good cause appears to the court,* 20 days [2] from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desires it, to enable him to meet the application for the preliminary injunction. * * *

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation,
SUNSHINE BISCUITS, INC., a corporation,
and STANDARD BRANDS, INC., a corporation,
Petitioners,

v.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation,
SUNSHINE BISCUITS, INC., a corporation,
and STANDARD BRANDS, INC., a corporation,
Petitioners,

v.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 112-122)¹ is reported at 472 F.2d 764. The oral opinion of the District Court and the adjudication in criminal contempt (R. 96-102) are unreported.

¹ In conformity with the brief for petitioners, references to the Appendix are designated "R".

JURISDICTION

The judgment of the Court of Appeals was issued on January 18, 1973 (R. 117). A petition for rehearing was timely filed and denied on February 22, 1973 (R. 123). The petition for a writ of certiorari, filed on May 22, 1973, was granted on October 9, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, upon removal of a proceeding from a state court to a federal district court, a temporary restraining order which had been issued by the state court without hearing, and which by state law had a maximum duration of twenty days, was by operation of 28 U.S.C. § 1450 automatically converted on removal from an order of twenty days' duration into an order of indefinite duration, with the claimed result that the federal district court's denial within twenty days of the issuance of the order of a motion to dissolve it continued the order in effect indefinitely and supported an adjudication in criminal contempt for an asserted violation of it occurring more than six months after the issuance of the order.

STATUTES INVOLVED

As part of the procedure for removal of an action from a state court to a federal district court, 28 U.S.C. § 1450 provides that:

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

Pertinent provisions of Rules 52(a), 65(a) and (b), and 81(c) of the Federal Rules of Civil Procedure;

of Sections 4 and 7 of the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. § 101); and of Section 527 of the California Code of Civil Procedure are reprinted in the appendix to this brief (*infra*, pp. 1a-6a).

STATEMENT

A. The Proceeding before the California Superior Court

On May 15, 1970, petitioners Granny Goose Foods, Inc. and Sunshine Biscuits, Inc. filed a complaint in the Superior Court of the State of California, County of Alameda, alleging that respondent, hereafter called the Union, and various of its officers and agents were engaging in strike activity in breach of a collective bargaining agreement to which petitioners and the Union were allegedly parties (R. 6-15).² The alleged breach, according to the complaint, arose out of the refusal of the Union to accept and comply with "changes and revisions" in a master and local supplemental agreement which had been negotiated by petitioners' representatives and a so-called "National Freight Industry Negotiating Committee of the International Brotherhood of Teamsters" to succeed earlier agreements which had expired on March 31, 1970, some six weeks prior to the filing of the complaint (R. 10).

Upon the filing of the complaint, a temporary restraining order was issued by the Superior Court without hearing which in effect enjoined all existing strike activity (R. 15-17). In the same document the defendants in the state action were ordered to show cause on May 26, 1970, why a preliminary injunction should not

² The appendix at pages 6-15 sets forth the First Amended Complaint which was filed on May 18, 1970. The original complaint is not reprinted in the appendix, but its substantive allegations are identical with those in the First Amended Complaint.

be issued in the same terms as the temporary restraining order (*ibid.*). Three days later, on May 18, 1970, a "First Amended Complaint" was filed in the Superior Court which differed from the original complaint only in that it added petitioner Standard Brands, Inc. as a party plaintiff, and also added an additional individual defendant (R. 6-15, 27). Upon the filing of the First Amended Complaint the Superior Court issued *ex parte* and without hearing a "Modified Temporary Restraining Order and Order to Show Cause," the substantive provisions of which are identical with those in the original restraining order (R. 18-20). The return date for the modified order was May 26, 1970, the same as that provided in the original order (R. 18).

On May 19, 1970, prior to service upon counsel of the Modified Temporary Restraining Order of May 18, the Union and the individual defendants in the state action removed the state court proceeding to the United States District Court for the Northern District of California on the ground that the action arose under 29 U.S.C. § 185 (Section 301 of the Labor Management Relations Act, 1947) (R. 21-26).³ On May 20, 1970, following service of the Superior Court order on May 19, the Union and other named defendants filed in the District Court an "Amended Petition for Removal of Civil Action," attaching a copy of the First Amended Complaint, so as to ensure the effective removal of the entire proceeding from the Superior Court (R. 26-28). Following removal to the District Court there have been no further proceedings in the Superior Court which are relevant to the case before this Court.

³ Page 21 of the Appendix shows May 10, 1970 as the filing date of the Petition for Removal. This is a typographical error. It should read "May 19, 1970".

B. The Related Proceeding before the National Labor Relations Board

The dispute underlying the Superior Court action was also taken by petitioners to the National Labor Relations Board. In the proceeding before the Board the positions of the parties respecting the alleged breach of contract were fully developed. A brief examination of that case, which eventuated in a Board decision and order, is relevant to the legal issues discussed in the Argument. *Teamsters Local 70*, 195 NLRB No. 102 (1972), reprinted *infra*, pp. 21a-51a.

The unfair labor practice charge before the Board was filed by petitioners on April 21, 1970, and alleged that the Union was in violation of Sections 8(b)(3) and 8(b)(1)(B) of the National Labor Relations Act by refusing to abide by the new agreement which, as alleged in the complaint in this case, had been negotiated by representatives of petitioners and a national committee of the International Brotherhood of Teamsters. The position of the Union in the case before the Board was that it had taken appropriate steps to withdraw from the national multi-employer, multi-union bargaining unit in which the contract negotiations had been conducted, and that it was therefore not a party to the new agreement. The Union also argued that petitioners and the Union had a history of separate contract negotiations and accordingly were not parties to the national negotiations which resulted in the contract to which petitioners sought to hold the Union.

Following hearing, the Board on February 17, 1972, sustaining the decision of its Administrative Law Judge, rejected the Union's position, and held that the Union was bound by the new national agreement. The strike activity alleged in the complaint in the Superior Court in the instant proceeding was found by the

Board to constitute a violation of Sections 8(b)(3) and 8(b)(1)(B) of the Act in that it "was for the purpose of forcing or requiring the Charging Parties [petitioners here] to bargain on an individual basis" (*infra*, pp. 45a-46a).

**C. Proceedings in the District Court Immediately
Following Removal**

On May 19, 1970, simultaneously with the filing of the Petition for Removal, the Union and the other named defendants filed a motion to dissolve the temporary restraining order issued by the Superior Court (R. 31). The motion was filed on the single ground that the District Court lacked jurisdiction to maintain the order in effect under this Court's decisions in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), and *Avco Corporation v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (R. 33). An order shortening time was issued, and the motion was noticed for May 22, 1970 (R. 35). Petitioners also filed a motion to remand the case to the Superior Court, and noticed it for the same day, May 22, 1970 (R. 38-39, 55).

The motions to remand and to dissolve were heard together by the District Court on May 27, 1970, the delay having been occasioned by the transfer of the case from the judge to whom it was originally assigned to a different judge (R. 37). The motion to remand was denied from the bench at the conclusion of the hearing (see R. 56, 98). The motion to dissolve was submitted for consideration and determination. The motion was thereafter denied on June 4, 1970, in a short written order, which reads in relevant part as follows (R. 56):

The only issue now before the court is whether or not the District Court is mandated to dissolve the

State Court temporary restraining order. The Supreme Court decision in the recent case of *The Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, — U.S. — (June 1, 1970), is dispositive of the issue. Accordingly, It Is Ordered that the motion to dissolve the State Court temporary restraining order is Denied.

The record shows no further activity in this proceeding in the District Court until the institution of the contempt proceeding which gave rise to the case before the Court, and which we describe next.

D. The Contempt Proceeding in the District Court

On December 1, 1970, petitioners filed a "Motion for Contempt Judgment" against the Union alleging that it "has failed and refused to comply with the provisions of the Modified Temporary Restraining Order" issued by the Superior Court on May 18, 1970, by instituting strike and picketing activities against petitioners on November 30, 1970 (R. 56-61, 68).⁴ The motion requested that the Union be held "in civil and criminal contempt of this Court for having violated the terms of [the] Modified Temporary Restraining Order" (R. 60).

Affidavits attached to the motion allege the following events which precipitated the strike and picketing activity: On November 9, 1970, the Union sent petitioners telegrams requesting meetings for the purpose

⁴ Although the record does not contain any express evidence with respect to the period between June 4, 1970, when the motion to dissolve was denied, and November 1970, when the alleged contempt occurred, the affidavits filed in support of the contempt motion plainly imply, as does the motion itself, that there was no strike or picketing activity during this interval (see R. 61-68, 70, 73, 75, 76, 82, 83).

of negotiating a collective bargaining agreement (R. 61-62). Petitioners' attorney answered the Union by letter dated November 11, 1970, stating that a contract was presently in effect, and that petitioners declined on that ground to negotiate (R. 64-65). In a letter dated November 13, 1970, the Union's attorney informed petitioners' attorney that in the Union's view there was no contract in effect, and that there was also no order in effect which "forbids Local 70 from bargaining with the employer . . ." (R. 67). The letter further states that it was the Union's position that the restraining order issued on May 18, 1970 by the Superior Court "has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction" (*ibid.*). The affidavits in support of the contempt motion further allege that picketing and strike activity by the Union was in fact begun on November 30, 1970, and was in effect on December 1, 1970 when the motion was filed (R. 71, 73, 76, 79, 83, 86).

At the time of the filing of the contempt motion, the District Court issued an Order Shortening Time, and scheduled a hearing for 10:30 a.m. on December 2, 1970 (R. 91). The hearing began approximately one-half hour late on December 2, 1970, the delay resulting from the fact that counsel for the Union was required to appear in a different court in a nearby city earlier that morning in another case (Tr. 3-8, *infra*, pp. 8a-11a).⁵ At the outset of the hearing, the

⁵ "Tr." refers to those parts of the transcript of the contempt proceedings on December 2, 1970, which have not been printed in the Joint Appendix before this Court. Parts of the transcript not reprinted in the Joint Appendix are reproduced as an appendix to this brief, *infra*, pp. 7a-20a.

Union moved for severance of the criminal and civil contempt cases, and severance was granted from the bench (Tr. 9-10, *infra*, pp. 12a-13a). The District Court directed that the criminal contempt case proceed forthwith (Tr. 11, *infra*, p. 13a). The Union then moved to quash the order to show cause on the ground that the temporary restraining order which was alleged as the basis for the contempt action had expired long before the acts occurred which were claimed to violate it (Tr. 12, 15, *infra*, pp. 14a, 16a). The motion was denied (Tr. 12-15, *infra*, pp. 14a-16a).

At this point in the proceeding counsel for the Union was given a short time to read through the moving papers and affidavits in the contempt proceeding, which he had not before then had an opportunity to examine (Tr. 11-12, 15-16, *infra*, pp. 14a, 16a-17a). Immediately thereafter petitioners presented evidence that the Union had instituted picketing on November 30, 1970, in support of its request for bargaining and a contract, and that a work stoppage was then in effect (Tr. 16-78). At the conclusion of petitioners' case the Union moved for a continuance for the purpose of preparing a defense (Tr. 80-82, *infra*, pp. 19a-20a). The motion was denied (Tr. 82, *infra*, p. 20a), the District Court stating that "the case is submitted and I'm going to make a ruling now" (R. 96).

The Court summarized from the bench the proceedings which had occurred in the Superior and District Courts, and stated its conclusion that under 28 U.S.C. § 1450 the modified temporary restraining order of May 18, 1970 was still in full force and effect (R. 96-99). The District Court ruled that the picketing and strike activity which began on November 30, 1970 was "in open and flagrant defiance of the order of the

Court" (R. 101). The Court thereupon imposed a fine upon the Union in the sum of \$200,000 with the following conditions (R. 101-102):

\$150,000 of that fine is conditional on the . . . [Union's] failure to purge itself within 24 hours of the date and hour of the signing of the Court's order; \$100,000 of said fine is conditioned upon the . . . [Union's] failure to purge itself within 48 hours of the date and hour of this order; and \$50,000 of said fine is conditioned upon the . . . [Union's] failure to purge itself within 72 hours of the date of the signing of the Court's order.*

The Union had earlier protested that "the temporary restraining order issued by the Superior Court . . . was issued without any kind of a hearing and without any arguments on the merits at all" (Tr. 15, *infra*, p. 16a). And it later reiterated that "The basis of this entire case is something we haven't heard very much about yet, and that's the question of whether or not there is a contract between Local 70 [the Union] and the various companies involved. There's never been any evidence presented to the Court on that matter, either to this Court or to the Superior Court where the temporary restraining order was issued." (Tr. 78, *infra*, p. 17a). But the District Court was unimpressed stating that it did "not deem that to be relevant to the contempt proceeding presently before it" (Tr. 79 *infra*, p. 18a). Informed by the Union's counsel that "we in-

* The oral recitation of the proceeding and the judgment in the contempt case were transcribed and subsequently signed by the District Court as its Findings, Conclusions and Judgment. Following entry of the judgment, the Union complied immediately with the purgation provisions of the judgment, with the consequence that the fine which must be paid under the District Court's order is in the sum of \$50,000 (see R. 107-108).

tend to appeal your decision, and . . . request a stay of your order pending appeal," the District Court responded that it would grant "a stay of the order upon the deposit of a bond of \$1,000,000 to cover damages" (R. 102). The Union complied with the terms of purgation, thus fixing the punishment for contempt at \$50,000, and the Court of Appeals stayed payment of this fine upon the posting of a bond in that sum (R. 104-108).

E. The Decision of The Court of Appeals

On appeal from the adjudication of criminal contempt, a divided Court of Appeals reversed the judgment on the ground that "the order [of May 18, 1970] expired by operation of law after removal of the cause to the federal court and before the alleged contumacious conduct occurred" (R. 112). The Court of Appeals pointed out that under California law the temporary restraining order would have expired no later than 20 days after its issuance, the same maximum duration which is affixed to a temporary restraining order issuable pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (R. 114-115). It observed that nothing in the fact of removal, or in the policy of 28 U.S.C. § 1450 preserving state orders from subtraction because of removal, serves to enlarge the duration of a state order simply as a result of removal, explaining that (R. 116-117):

Section 1450 does not create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court. Section 1450 permits transfer to the federal court of state court restrain-

ing orders without any loss of potency during the trip. It adds nothing to the terms of state orders. The purpose of section 1450 is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted. Employers' construction of section 1450 would offend the policy of California and federal policy imposing strict limitations on the longevity of temporary restraining orders.

Accordingly, the Court of Appeals concluded that "The temporary restraining order could not survive beyond June 7, 1970, the last day within its maximum state life, a date months before the alleged contumacious acts transpired" (R. 117).⁷

In the view of the dissenting judge, the limitation on the duration of the state order fixed by state law was irrelevant, for as he saw it 28 U.S.C. § 1450 perpetuates a state order indefinitely, subject only to the power of the District Court to dissolve or modify it (R. 118). Alternatively, according to the dissenting judge, the denial by the District Court of the Union's motion to dissolve the temporary restraining order converted it into a preliminary injunction which would remain operative until final disposition of the case (R. 119-122).

SUMMARY OF ARGUMENT

On May 18, 1970, the Superior Court issued an *ex parte* temporary restraining order prohibiting all strike activity. Under California law the maximum

⁷ This disposition made it unnecessary for the Court of Appeals to reach other grounds urged by the Union to support reversal. These other grounds included denial of a fair trial, want of a disinterested attitude on the part of the trier, and excessive and unauthorized punishment.

duration of that order was twenty days, and it would therefore expire by operation of law no later than June 7, 1970. On May 20, 1970, the proceeding was removed from the Superior Court to the federal district court. The District Court heard the Union's motion to dissolve the order on May 27, 1970, and denied it on June 4, 1970. At that point in time the order still had three additional days to run, so that the effect of the denial of the motion to dissolve was to continue the order in effect until June 7, 1970, and on that day it would expire by operation of law. Accordingly, petitioners had until June 7 to secure a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. But they did not even apply for a preliminary injunction, much less obtain one. Failing that, the temporary restraining order expired, and nothing replaced it. There was thus no order in existence after June 7, 1970.

But, it is argued, as a consequence of the simple fact of the removal of the proceeding from the state court to the federal court, 28 U.S.C. § 1450 operated to convert the state order having a limited twenty-day duration into a federal order of unlimited duration, its term to endure without diminution unless the District Court affirmatively exercised its power to modify or dissolve it. Since the District Court refused to dissolve the order, it is said that the state order continued to run without limit. But the words of section 1450 support no such reading, and its purpose repels it.

In providing that "All . . . orders . . . in such [state] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court," section 1450 mandates that the state order shall retain exactly that "full force and effect" that it had

before removal. But the full force and effect that the state order had before removal can only be ascertained by reference to the state law which gave it birth and defines its attributes. If, as in this case, the state order has a time limitation built into it by state law, the state order which comes into the federal court on removal brings its time limitation with it as an integral part of the order. Thus, in retaining the time-limited character of the order on removal, the order has the same unimpaired status subsequent to removal as it had prior to removal, and therefore "remain[s] in full force and effect" in precise conformity with the wording of section 1450. When that order expires after removal because its term has run, it has not lost any of its "full force and effect" because of removal. It has simply exhausted all the "full force and effect" that it ever had. An order by the District Court to dissolve or modify it would be necessary only if the movant's object were to *reduce* the "full force and effect" that the order had before removal. But a self-dissolving state order does not require affirmative dissolution by the federal court subsequent to removal any more than it would have required affirmative dissolution by the state court had there been no removal.

The purpose of section 1450 exactly fits this reading of its words. Its manifest object is to maintain the order in the same state of efficacy after removal that it had before removal. It is designed to prevent the act of removal from working either an automatic subtraction from or an automatic addition to the force that the state order would have had absent removal. The mere fact of removal is to have a neutral effect on the operativeness of the order. If the order is subject to a condition subsequent, the condition remains; if the order is limited to a term certain, the term remains.

A state order with an explicit term certain would not acquire an additional duration simply because of removal. The situation is identical whether the term certain is built into the order by operation of law or is expressed in so many words on the face of the order. In short, the purpose of section 1450 is to maintain the order in the same status after removal that it had before removal, neither to enlarge nor to diminish it automatically just because of removal. Accordingly, section 1450 did not operate to convert an order with a twenty-day duration into an order of unlimited duration.

This construction of section 1450 is fortified by its correspondence with other federal law. As the Court of Appeals states, "If the restraining order had been initially granted by the federal district court, it would have expired not later than June 7, 1970, under the provisions of Rule 65(b) of the Federal Rules of Civil Procedure" (R. 114-115). This is the same date on which it expired under state law. Accordingly, under both state and federal law the restraining order terminates by operation of law at the same time. There is no reason why the mere act of removal should give the restraining order greater duration that it would have had if the proceeding had remained in the state system or had been commenced in the federal system. Federal and state law are consonant as to the maximum duration of a restraining order, and nothing in the policy of removal suggests a result incompatible with both state and federal law.

Furthermore, had a federal district court initially issued the temporary restraining order, section 7 of the Norris-LaGuardia Act would have governed its grant because it would be an "injunction in any case

involving or growing out of a labor dispute. . . ." Section 7 requires that a temporary restraining order may be issued only upon "testimony under oath," may last "no longer than five days," and its limited duration is emphasized by the peremptoriness of the command that it "shall become void at the expiration of said five days." This strong federal circumscription upon the issuance of a temporary restraining order in a labor dispute, both procedurally in its grant and time-wise in its duration, would be utterly subverted were a state restraining order of limited duration to be converted into a federal restraining order of unlimited duration simply by denial of a motion to dissolve subsequent to removal. There is no discernible policy underlying section 1450 which would support a result so destructive of a command which section 7 of the Norris-LaGuardia Act expresses. Section 7 and section 1450 are both federal imperatives, and rather than subjugation of one by the other, the two are to be accommodated to each other.

There is no merit to the alternative ground expressed by the dissenting judge to support the contempt adjudication, namely, that "the temporary restraining order continued in existence as a preliminary injunction after hearing by the district court and its denial of the motion to dissolve the restraint" (R. 122).

The District Court entitled its ruling "Order Denying Motion To Dissolve State Court Temporary Restraining Order" (R. 55). This title surely does not denote a preliminary injunction, and the circumstances attending its issuance preclude ascription of that status to it. The hearing on May 27, 1970 came on by notice of motion to dissolve the temporary restraining order (R. 31), and by notice of motion to remand (R. 38). Neither notice constitutes the notice required by Rule

65(a)(1) of the Federal Rules of Civil Procedure as a prerequisite to issuance of a preliminary injunction: "No preliminary injunction shall be issued without notice to the adverse party." Furthermore, the requirement of notice imports a hearing. " 'Notice' implies a hearing and all the cases are consistent with the principle that the defendant must be given a fair opportunity to oppose the application." 7 Moore's Federal Practice, 65-57, ¶65.05[3] (2d ed., 1973). It is indisputable in this case that there has been no hearing which could be described as "a fair opportunity to oppose" a preliminary injunction, and surely none that would meet the very specific and strict requirements that section 7 of the Norris-LaGuardia Act independently mandates. Finally, Rule 52(a) of the Federal Rules of Civil Procedure provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action," and section 7 of the Norris-LaGuardia Act separately requires that particular findings be made all of which are applicable to this action except that embraced by subpart (e). There were no findings of fact and conclusions of law made at all, much less of the kind required by section 7.

Accordingly, it would be altogether fictive to give the "Order Denying The Motion To Dissolve State Court Temporary Restraining Order" the status of a preliminary injunction. It simply continued the restraining order in effect for the additional three days of life it had before it expired by operation of law. At most, it constituted a declaration of power to issue a preliminary injunction, not the exercise of that power. There was neither notice, hearing, nor findings which could make more of it than that. Indeed, since

it is impossible to know that denial of the motion to dissolve, rather than continuing the order in effect for another three days, was to operate as a preliminary injunction, the order said to constitute a preliminary injunction would be too vague as to its import to support an adjudication in criminal contempt.

Finally, were the order denying the motion to dissolve to be given the effect of a preliminary injunction it would constitute a void order which could not support an adjudication in criminal contempt. It is plain on the face of the papers that the order is not addressed to a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement (*Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 253-255 (1970)), and it is therefore a bald strike injunction that "No court of the United States shall have jurisdiction to issue . . ." § 4, Norris LaGuardia Act. Furthermore, there was utter failure to afford any notice and opportunity for hearing to show that power to issue the strike injunction was lacking. The combination of lack of power and fundamental want of procedural due process produces a void order which there is no duty to obey.

ARGUMENT

I. THE TEMPORARY RESTRAINING ORDER ISSUED BY THE SUPERIOR COURT HAD EXPIRED BEFORE THE UNION WAS FOUND TO HAVE VIOLATED IT.

A. Under California Law, the Order of May 18, 1970, Had a Maximum Duration of Twenty Days.

The Superior Court issued the temporary restraining order on May 18, 1970 pursuant to, and its duration was governed by, Section 527 of the California Code of Civil Procedure (*infra*. pp. 5a-6a). Section

527 forbids the issuance of a preliminary injunction without notice, and similarly prohibits the issuance of a temporary restraining order without notice "unless it shall appear from the facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice." And Section 527 unequivocally fixes the duration of a temporary restraining order at a maximum period of twenty days:

In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order.

As the Court of Appeals observed (R. 115, n. 1), and as the dissenting judge agreed (R. 117), it is settled California law that Section 527 automatically terminates a temporary restraining order on the specified return date of the accompanying order to show cause, or if the restraining order is continued by the court upon a showing of "good cause," upon the expiration of 20 days from the date of the order. *Sharpe v. Brotsman*, 145 C.A. 2d 354, 358, 359, 302 P.2d 668 (1956); *Lockwood v. Sheedy*, 157 C.A. 2d 844, 321 P.2d 863 (1958); see *Curtiss v. Bachman*, 110 Cal. 433, 439, 42 P. 910 (1895). The limitation upon the duration of the order is strictly construed. If the restraining order provides on its face for a duration in excess of that permitted by Section 527, the order is void *ab initio*. *Oksner v. Superior Court*, 229 C.A. 2d 672 (1964); *Agricultural Prorate Commission v. Superior Court*, 30 C.A. 2d 154, 155, 85 P.2d 898 (1938); B. E. Witkin,

California Procedure (2d ed. 1970, p. 1522). As summarized in *Kelsey v. Superior Court*, 40 Cal. App. 229, 236, 180 P. 662 (1919): "The provisions of Section 527 provide a complete scheme in a proper case for obtaining a writ of injunction and such scheme must be deemed the measure of the power to be exercised by trial courts in the matter of provisional injunctions."*

Accordingly, the Court of Appeals concluded that under California law the May 18 order "expired by operation of law" no later than June 7, 1970, twenty days after its entry (R. 114). It recognized the possibility that the order might have expired earlier on its return date of May 26, 1970, but deemed it reasonable to "assume that the Union would have moved the state court to dissolve, as it did in the federal court, and that there would possibly have been continuance of the return date within the 20-day maximum permitted by statute" (R. 114, n. 1). The assumption makes good sense. It gives maximum effect to the policy of 28 U.S.C. § 1450 of not having the simple fact of removal subtract from the efficacy that an outstanding state order might otherwise have (*infra*, pp. 22-25). It avoids the artificiality of having a return date specified in a state order, which would have been alter-

* Petitioners' argument that "California does not establish an inflexible automatic expiration date for temporary restraining orders" (br. p. 10, n. 6, and p. 6, n. 3) is not persuasive. The circumstance that a defendant against whom an *ex parte* order is issued may request or stipulate to a continuance of an order does not affect the restriction of law on its duration in the absence of consent. Lacking consent, and there was none in the present case, a California court cannot continue a temporary restraining order beyond the statutory period; to do so would be "to nullify the terms of the statute, which are so plain and unambiguous that no room exists for interpretation." *Smith v. Superior Court*, 64 Cal. App. 722, 730, 222 P. 857 (1923).

able had the proceeding remained in the state court, constitute an irrevocable and fixed terminal point once the proceeding is removed. Accordingly, indulging every consideration in favor of its maximum duration under California law, the date of June 7, 1970, was the necessary terminal point of the May 18, 1970 order.

This time frame governs the present case. Given the entry of the temporary restraining order on May 18, 1970, its maximum duration of twenty days would cause it to expire by California law no later than June 7, 1970. On June 4, 1970, following removal, the District Court denied the motion to dissolve the order. The effect of this denial was to continue the restraining order in effect for another three days, or until June 7, for on June 4 the order still had three additional days to run before its expiration by operation of law on June 7. Accordingly, petitioners had until June 7 to secure a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. But they did not even apply for a preliminary injunction, much less obtain one. Failing that, the temporary restraining order expired, and nothing replaced it. There was thus no order in existence after June 7, 1970.

In sum, as the Court of Appeals unanimously agreed—the dissenting judge no less than the majority (R. 114, 117)—the May 18, 1970 temporary restraining order expired by operation of California law on June 7, 1970, twenty days from its entry. Its posture was precisely as if the order had in so many words stated that it terminated on June 7, 1970. Accordingly, the exact question presented is whether, as the result of the simple fact of removal, 28 U.S.C. § 1450 operated

to convert a state order of limited duration into a federal order of unlimited duration, its term to endure without diminution unless the District Court affirmatively exercised its power to modify or dissolve it. We turn to that question.

B. 28 U.S.C. §1450 Did Not Operate To Convert a State Order of Twenty-Days' Duration into a Federal Order of Unlimited Duration.

It is argued that as a consequence of the removal of the proceeding from the state court to the federal court, 28 U.S.C. § 1450 did indeed operate to convert the state order having a limited twenty-day duration into a federal order of unlimited duration, its term to endure in perpetuity unless the District Court affirmatively exercised its power to modify or dissolve it. Since the District Court refused to dissolve the order, it is said that the state order continued to run without limit. But the words of section 1450 support no such reading, and its purpose repels it.

In providing that "All . . . orders . . . in such [state] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court," section 1450 mandates that the state order shall retain exactly that "full force and effect" that it had before removal. But the full force and effect that the state order had before removal can only be ascertained by reference to the state law which gave it birth and defines its attributes. If, as in this case, the state order has a time limitation built into it by state law, the state order which comes into the federal court on removal brings its time limitation with it as an integral part of the order. Thus, in retaining the time-limited character of the order on removal, the order

has the same unimpaired status subsequent to removal as it had prior to removal, and therefore "remain[s] in full force and effect" in precise conformity with the wording of section 1450. When that order expires after removal because its term has run, it has not lost any of its "full force and effect" because of removal. It has simply exhausted all the "full force and effect" that it ever had. An order by the District Court to dissolve or modify it would be necessary only if the movant's object were to *reduce* the "full force and effect" that the order had before removal. But a self-dissolving state order does not require affirmative dissolution by the federal court subsequent to removal any more than it would have required affirmative dissolution by the state court had there been no removal.

The purpose of section 1450 exactly fits this reading of its words. Its manifest object is to maintain the order in the same state of efficacy after removal that it had before removal. It is designed to prevent the act of removal from working either an automatic subtraction from or an automatic addition to the force that the state order would have had absent removal. The mere fact of removal is to have a neutral effect on the operativeness of the order. If the order is subject to a condition subsequent, the condition remains; if the order is limited to a term certain, the term remains. A state order with an explicit term certain would not acquire an additional duration simply because of removal. The situation is identical whether the term certain is built into the order by operation of law or is expressed in so many words on the face of the order. In short, the purpose of section 1450 is to maintain the order in the same status after removal that it had before removal, neither to enlarge nor to diminish it

automatically just because of removal. Accordingly, section 1450 did not operate to convert an order with a twenty-day duration into an order of unlimited duration.

Precedent is sparse but fully supports this conclusion.* Thus, "if a judgment finally adjudicating rights of the parties has been rendered in the state court before removal, it has the same effect as if rendered in the Federal Court, *but it has no greater force.*" *Savell v. Southern Ry Co.*, 93 F.2d 377, 379 (C.A. 5, 1937) (emphasis supplied). Similarly, "[i]nterlocutory orders made in the state court clearly do not, by virtue of their removal to the United States circuit court, receive any . . . additional force and effect . . ."; they retain the "force and effect" they had but they do not acquire "any greater force and effect . . . *Bryant v. Thompson*, 27 Fed. 881, 882 (C.C.S.D., Iowa, 1886)."

In like fashion, the command of section 1450 does not operate to cure defects in the state court action. ". . . [T]he cause is transferred to the district court as it stands in the state court"; removal does not improve its posture or enhance its immunity from challenge. *Cain v. Commercial Publishing Co.*, 232 U.S. 124, 133 (1914). "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter, or of the parties, the federal court

* The language which now appears in 28 U.S.C. § 1450 has undergone no substantial change since its appearance as Section 4 of the Act of March 3, 1875, 18 Stat. 470.

¹⁰ And see, *Hill v. U.S. Fidelity & Guaranty Co.*, 428 F.2d 112, 115 (C.A. 5, 1970); *Butner v. Neustadter*, 324 F.2d 783, 785 (C.A. 9, 1963); *Munsey v. Testworth Laboratories*, 227 F.2d 902, 903 (C.A. 6, 1955); *Kizer v. Sherwood*, 311 F. Supp. 809 (D.C.M.D.Pa., 1970).

acquires none. . . ." *Lambert Run Coal Co. v. Baltimore & Ohio Railroad*, 258 U.S. 377, 382 (1922).¹¹

These are but applications of the unifying principle which underlies section 1450. Removal as such neither adds to nor detracts from the state court proceeding, including the force and effect of the orders that the state court had issued. In short, the federal court "takes the case up where the State Court left it off" (*Duncan v. Gegan*, 101 U.S. 810, 812 (1880)), and therefore in this case the temporary restraining order of May 18, 1970 issued by the Superior Court arrived in the District Court with the same status that it had before removal. It had a twenty-day life span as it came into the District Court. Section 1450 protected the full duration of that life span, and that fulfilled the entire purpose of section 1450; but section 1450 did not elongate that duration, and that was no part of its purpose.¹²

¹¹See also, *Minnesota v. United States*, 305 U.S. 382, 395 (1939); *Dry Cline Lamp Corp. v. Edwards*, 389 F.2d 591, 595-596 (C.A. 5, 1968); *Curtis Co. v. Falls, Inc.*, 305 F.2d 811, 814 (C.A. 3, 1962); *In re Chicago Rapid Transit Co.*, 192 F.2d 206, 208 (1951); *Dunn v. Cedar Rapids Engineering Co.*, 152 F.2d 733, 734 (C.A. 9).

¹²Petitioners vastly overstate the import of the cases they cite when they assert with staggering hyperbole that "[w]ithout exception, the courts of other Circuits have determined that only dissolution by the federal court terminates such a state court order" (br. p. 13). Cited at page 11 of their brief, *Appalachian Volunteers v. Clark*, 432 F.2d 530 (C.A. 6, 1970), cert. denied, 401 U.S. 939 (1971), dealt with a state order which "had no termination date" (432 F.2d at 532), and therefore is inapposite to the distinctive question of a state order containing a term certain limiting its duration. As to *Morning Telegraph v. Powers*, 450 F.2d 97 (C.A. 2, 1971), cert. denied, 405 U.S. 954 (1972), cited at p. 12, petitioners themselves describe the Second Circuit's statement as "dicta." It was a passing reference, not essential to the decision, the central issue being the appealability of what was said to be a temporary

C. Other Federal Law Is in Harmony with the Conclusion That 28 U.S.C. §1450 Does Not Operate To Convert a State Order of Limited Duration into a Federal Order of Unlimited Duration.

The conclusion that 28 U.S.C. § 1450 neither adds to nor subtracts from the duration that a state order had before removal is fortified by other federal law to which section 1450 should correspond unless there is a compelling reason for attributing a contradictory direction to it. On removal the "forms and modes of proceeding are governed by federal law." *Freeman v. Bee Machine Co.*, 319 U.S. 448, 452 (1943). See also, *Ex parte Fisk*, 113 U.S. 713, 725, 726 (1885). As Rule 81(c) of the Federal Rules of Civil Procedure provides, "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal."

We therefore now show that the interpretation of section 1450 adopted by the Court of Appeals harmonizes, and a contrary conclusion would conflict, with both Rule 65(b) of the Federal Rules of Civil Procedure and section 7 of the Norris-LaGuardia Act. We need hardly add that a meshing interpretation of cognate laws is obviously preferable to a discordant construction.

1. Rule 65(b) of the Federal Rules of Civil Procedure

As the Court of Appeals states, "If the restraining order had been initially granted by the federal district court, it would have expired not later than June 7,

restraining order but which was in actuality the equivalent of a preliminary injunction. See, *Wright*, *Federal Courts*, 459 (2d ed. 1970). As to the two District Court opinions cited at pages 12-13 of petitioners' brief, the statements are again conclusory and passing, each peripheral to the core issues upon which decision focused. The decision below is the only fully considered determination by any court of the question presented, and there is no precedent opposing its conclusion to which any persuasive appeal can be made.

1970, under the provisions of Rule 65(b) of the Federal Rules of Civil Procedure" (R. 114-115). That rule provides in relevant part that:

Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

Accordingly, the maximum duration of a nonconsensual temporary restraining order under Rule 65(b) is twenty days, the same maximum duration which California law fixes. And, like California law, under Rule 65(b) the order expires by operation of law upon the elapse of the specified time limitation, and thereupon becomes "ineffective as far as the parties therein restrained . . . [are] concerned." *Southard & Co. v. Salinger*, 117 F.2d 194, 196 (C.A. 7, 1941).¹³ The operation of this limitation is not affected by the circumstance that there may have been informal notice to the party restrained where, as here, issuance of the order was without opportunity for a hearing. See *Austin v. Altman*, 332 F.2d 273, 275 (C.A. 2, 1964). As one District Court stated, where counsel for the defendant was given two-days' notice of the application

¹³ See also, *Weintraub v. Hanrahan*, 435 F.2d 461, 463 (C.A. 7, 1970); *Dilworth v. Riner*, 343 F.2d 226, 229 (C.A. 5, 1965); *Benitez v. Anciani*, 127 F.2d 121, 125 (C.A. 1, 1942), cert. denied 317 U.S. 597 (1942); *In re California Lumber Corp.*, 24 FRD 190 (D.C.S.D. Calif., 1969).

and appeared in court at the time of issuance, "under these circumstances it would be stretching the requirements of due process to convert a temporary restraining order into a hearing for preliminary injunction." *Bailey v. Transportation-Communications Employees Union*, 45 FRD 444, 445 (D.C. N.D. Miss., 1968). See also, *Connell v. Dulien Steel Products*, 240 F.2d 414, 417 (C.A. 5, 1957), cert. denied, 356 U.S. 968 (1958); Cf., *Benitez v. Anciani*, 127 F.2d 121, 125 (C.A. 1, 1942), cert. denied, 317 U.S. 597 (1942).¹⁴

¹⁴The rule is the same under California law. *Johnson v. The West Mining Co.*, 22 Cal. 479 (1863). For a description of the practice in California courts of inviting counsel for the party against whom a restraining order is sought to attend an informal conference in the chambers of the issuing judge at the time application is made, see *Procedure Before Trial* (Continuing Education of the Bar, Univ. of Calif. Press, 1967), p. 625. As there noted, "Participation in such an informal conference should not constitute a waiver of the notice required under Section 529 [of the California Code of Civil Procedure] before a preliminary injunction may issue."

The authorities cited in the text and accompanying note require rejection of petitioners' suggestion (br. pp. 17-18) that federal law would treat the original Superior Court order of May 15, 1970, as a preliminary injunction on the ground that counsel for the Union appeared at the time of its issuance in response to telephonic notice. Moreover, the order which is in issue in the present case is the modified temporary restraining order of May 18, 1970, which was issued in the absence of counsel for the Union, although again telephonic notice was given that application would be made. The cases relied on by petitioners (br. 18) do not support their argument. They deal with the question of whether a particular order can be treated as a preliminary injunction rather than a temporary restraining order for purposes of determining appealability. See *Wright*, *Federal Courts*, 459 (2d ed. 1970). Even if it were to be assumed, contrary to every uncontested fact of record, that the Superior Court order of May 18, 1970, constitutes a preliminary injunction, it plainly could not pass muster under Rule 65 or any other federal test for the issuance of such an order. *Sims v. Greene*, 160 F.2d 512, 516 (C.A. 3, 1947); *National Mediation Board v. Air Line Pilots Association*, 323 F.2d 305 (C.A.D.C., 1963). See also the discussion *infra*, pp. 34-42.

Thus, the twenty-day maximum duration of a temporary restraining order is identical under Rule 65(b) of the Federal Rules of Civil Procedure and section 527 of the California Code of Civil Procedure. Federal and state law converge. Under both the order in this case terminated by operation of law at the same time on June 7, 1970. There is no reason why the mere act of removal should give the restraining order greater duration than it would have had if the proceeding had remained in the state system or if it had been originally commenced in the federal system. Federal and state law are consonant as to the maximum duration of a restraining order, and nothing in the policy of removal suggests a result incompatible with both state and federal law.¹⁵

2. Section 7 of the Norris-LaGuardia Act.

Had the District Court in this case initially issued the temporary restraining order, section 7 of the Norris-LaGuardia Act would have governed its grant because it would be an "injunction in any case involving or growing out of a labor dispute. . . ." Section 7 provides in relevant part that.

... [I]f a complainant shall ... allege that, unless a temporary restraining order shall be issued with-

¹⁵ Petitioners concede (br. pp. 15-17), as they must, that their interpretation of section 1450 results in a conflict with Rule 65(b). They seek to justify according preeminence to section 1450 by asserting that Rule 65(b) must yield by reason of 28 U.S.C. § 2071 which provides that "Such rules shall be consistent with Acts of Congress . . ." (br. p. 16). However, since section 1450 and Rule 65(b) are congruent, petitioners' argument is beside the point. It may be noted, moreover, that their argument is also mistaken. 28 U.S.C. § 2071 authorizes "The Supreme Court and all courts established by Act of Congress . . . [to] prescribe rules for the conduct of their business." It has reference only to rules of practice before the courts. Authority to establish the Federal Rules of Civil Procedure is contained in 28 U.S.C. § 2072, which does not contain the language upon which petitioners rely.

out notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days.

Thus, section 7 requires that a temporary restraining order may be issued only upon "testimony under oath," may last "no longer than five days," and its limited duration is emphasized by the peremptoriness of the command that it "shall become void at the expiration of said five days." This strong federal circumscription upon the issuance of a temporary restraining order in a labor dispute, both procedurally in its grant and time-wise in its duration, would be utterly subverted were a state restraining order of limited duration to be converted into a federal restraining order of unlimited duration simply by denial of a motion to dissolve subsequent to removal. There is no discernible policy underlying section 1450 which would support a result so destructive of a command which section 7 of the Norris-LaGuardia Act expresses. Section 7 and section 1450 are both federal imperatives, and rather than subjugation of one by the other, the two are to be accommodated to each other.

It may be argued that section 7 of the Norris-LaGuardia Act is inapplicable in this case because the action arises under section 301 of the Labor Management Relations Act, 1947, and in furtherance of this argument the authority of *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), may be invoked to support the claim that an LMRA § 301 action is

exempt from the control of the Norris-LaGuardia Act. But the argument would be insupportable on any premise. First of all, *Boys Markets* is addressed only to a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement (398 U.S. at 253-254), and the controversy in this case is wholly outside this scope. The dispute related instead to whether the Union was bound to any agreement at all; petitioners claimed that the Union and they were parties to a national agreement emerging from negotiations in a multi-union multi-employer bargaining unit; the Union claimed that it had withdrawn from that unit and was entitled to bargain independently with petitioners in accordance with an historical practice of separate negotiations among the parties; there was no agreement to resolve this controversy by arbitration, the dispute being decided ultimately by the National Labor Relations Board (*supra*, pp. 3, 5-6, 7-8, 10, *infra*, pp. 21a-51a). In this situation *Boys Markets* is wholly inapplicable (*infra*, pp. 44-47), and section 7 of the Norris-LaGuardia Act retains its full undiminished force.

But even if this were a dispute within the scope of *Boys Markets*, the limitations imposed by section 7 upon the grant of a temporary restraining order would still obtain. *Boys Markets* lifts the restrictions of the Norris-LaGuardia Act only to the extent necessary to give effect to the exercise of equity jurisdiction to enjoin a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement. The limitations of section 7 of the Norris-LaGuardia Act on the grant of a temporary restraining order in a labor dispute do not affect the efficacy of the grant of injunctive relief to enjoin a breach-

of-contract strike over an arbitrable dispute and therefore continue in full force. *Emery Air Freight Corp. v. Local Union No. 295, Teamsters*, 449 F.2d 586, 588 (C.A. 2, 1971), cert. denied, 405 U.S. 1066 (1973). So long as there is "no conflict" between an otherwise applicable provision of the Norris-LaGuardia Act "and the policy in favor of arbitration" succored by LMRA § 301, the provision of the Norris-LaGuardia Act is to be observed. *New York Telephone Co. v. Communications Workers of America*, 445 F.2d 39, 49-50 (C.A. 2, 1971). This is true of actions to enforce the Railway Labor Act (*ibid.*; *Brotherhood of Railroad Trainmen v. Akron & Barbetron Belt Co.*, 385 F.2d 581, 613-614 (C.A.D.C., 1967), cert. denied, 390 U.S. 923 (1968); same case, 420 F.2d 72, 73-74 (C.A.D.C., 1968), cert. denied, 397 U.S. 1024 (1970)), and the same is equally true of actions arising under LMRA § 301. Enforcement of the arbitration promise through prohibition of a strike in breach of it is entirely consistent with full preservation of the procedural safeguards erected by section 7 of the Norris-LaGuardia Act against rash and unreflective issuance of temporary restraining orders. Indeed, the remedy which *Boys Markets* fashioned can be best served by procedural care in its exercise. Accordingly, section 7 continues to exert its full command, and an interpretation of section 1450 which preserves section 7 from unnecessary dilution is obviously to be preferred to one which undercuts it.¹⁸

¹⁸ See also, in addition to previous citations in the text, *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (C.A. 3, 1972); *Food Fair Stores v. Food Drivers Local Union No. 400*, 84 LRRM 2509, 2512 (D.C.E.D. Pa., 1973); *L.A. Concrete Pumping v. Majich*, 84 LRRM 2653 (D.C.C.D. Cal., 1973), stay pending appeal denied, 84 LRRM 2655 (C.A. 9, 1973). While we stated in

D. The Upshot.

To convert a state order of limited duration into a federal order of unlimited duration simply as an automatic consequence of removal of the action from a state court to a federal court is without any support in reason. It does not give to the state order the "full force and effect" in the federal court after removal that it had in the state court before removal, but instead enlarges the force it had. It therefore does not comply with but contradicts the command of 28 U.S.C. § 1450. And this distortion subverts the requirements of Rule 65(b) of the Federal Rules of Civil Procedure in every case and the requirements of section 7 of the Norris-LaGuardia Act in every labor case. When all three federal commands can operate with full compatibility there is surely no reason to work a result which brings them into collision.

II. DENIAL OF THE UNION'S MOTION TO DISSOLVE DID NOT TRANSFORM THE TEMPORARY RESTRAINING ORDER INTO A PRELIMINARY INJUNCTION; AND IF ANY SUCH TRANSFORMATION HAD BEEN EFFECTUATED IT WOULD RESULT IN A VOID ORDER WHICH COULD NOT SUPPORT AN ADJUDICATION IN CRIMINAL CONTEMPT.

As an alternative ground upon which to support the adjudication in criminal contempt, the dissenting judge took the view that "the temporary restraining order continued in existence as a preliminary injunction after hearing by the district court and its denial of

our brief below that "[i]n view of . . . *Boys Markets* . . . the Norris-LaGuardia Act is not applicable in Section 301 suits" (p. 14, n. 7), further reflection and research has shown the error of that position, and in reversing ourselves we can at least take comfort from a venerable admonition against commitment to a foolish consistency.

the motion to dissolve the restraint" (R. 122). But the majority rejected that position, explaining that (R. 117):

If Employers wanted a preliminary injunction, they easily could have sought one. They did not do so. The Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate.

The majority's view is clearly correct. The District Court entitled its ruling "Order Denying Motion To Dissolve State Court Temporary Restraining Order" (R. 55). This title surely does not denote a preliminary injunction, and the circumstances attending its issuance preclude ascription of that status to it. Furthermore, were the order denying the motion to dissolve to be given the effect of a preliminary injunction it would constitute a void order which could not support an adjudication in criminal contempt.

We show, first, that denial of the motion to dissolve did not convert the temporary restraining order into a preliminary injunction, and, second, that any such conversion would have produced a void order to which no duty of obedience would be owed.

A. Denial of the Motion To Dissolve Satisfied None of the Requirements for Issuance of a Preliminary Injunction and Therefore Cannot Be Construed as One.

1. As a prerequisite to issuance of a preliminary injunction, Rule 65(a)(1) of the Federal Rules of Civil Procedure requires that: "No preliminary injunction shall be issued without notice to the adverse party." The hearing on May 27, 1970, followed by

denial of the motion to dissolve on June 4, 1970, was not held pursuant to any notice that a preliminary injunction was to be sought. The hearing came on by the Union's notice of motion to dissolve the temporary restraining order (R. 31), and by petitioners' notice of motion to remand the proceeding to the state court (R. 38). Petitioners' remand motion was based on the ground that "defendants have waived their right to removal by submitting to the jurisdiction of the state court" (R. 39). The Union's dissolution motion was based on the single "ground that the [District] Court is without jurisdiction to maintain the temporary restraining order in effect under Section 4 of the Norris LaGuardia Act 29 U.S.C. 104" (R. 31). In a one sentence statement of position in support of its motion, the Union cited this Court's decisions in *Avco Corporation v. Aero Lodge No. 735*, 390 U.S. 557, and *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (R. 33). Accordingly, neither the Union's nor petitioners' notices and motions constituted appraisal that a preliminary injunction was to be sought.

2. Nothing transpired at the hearing on May 27, 1970, which could enlarge the notices into an application for a preliminary injunction, and the ensuing ruling denying the dissolution motion did not constitute appraisal that a preliminary injunction that had not been sought had nonetheless been granted. The remand motion was denied from the bench at the conclusion of the hearing (R. 56, 98. Tr. 13, *infra*, p. 15a). As to the dissolution motion, the District Court recognized at the contempt hearing that "the only objection" at the hearing on that motion was that the court lacked jurisdiction "on the theory that the *Sinclair* decision was applicable" (R. 99, Tr. 12. *infra*, p. 14a).

The objection on that ground was taken under advisement at the conclusion of the hearing. Subsequent to the hearing, as the Court of Appeals stated, "[w]hile the motion to dissolve was pending, the Supreme Court [on June 1, 1970] decided *Boys Markets, Inc. v. Retail Clerks Union* (1970), 398 U.S. 235, a decision that destroyed the foundations of *Sinclair* . . . on which the Union's dissolution motion had been based" (R. 113-114). Accordingly, on June 4, 1970, in reliance on the intervening decision in *Boys Markets*, the District Court "Ordered that the motion to dissolve the State Court temporary restraining order is denied" (R. 98, Tr. 12-13, *infra*, pp. 14a-15a). Hence, the maximum import of the denial order was to continue the temporary restraining order in effect for its unexpired term; it could not constitute the issuance of a preliminary injunction, a matter which had been neither noticed nor heard.

3. This Court's decision in *Boys Markets* especially brought to the fore the reason why Rule 65(a)(1) mandates notice of application for a preliminary injunction. "'Notice' implies a hearing and all the cases are consistent with the principle that the defendant must be given a fair opportunity to oppose the application. Conversely, the plaintiff is entitled to a hearing on his application for a temporary injunction." 7 Moore's Federal Practice, 65-57, ¶-65.05[3] (2d ed., 1973).¹⁷ A hearing is essential for the movant "must show a substantial likelihood of success on the merits, and that

¹⁷ See also, *Sims v. Greene*, 160 F.2d 512 (C.A. 3, 1947); *Hawkins v. Board of Control of Florida*, 253 F.2d 752 (C.A. 5, 1968); *Marshall Durbin Farms Inc. v. National Farmers Organization*, 446 F.2d 353, 356 (C.A. 5, 1971); Cf., *United States v. Crusco*, 464 F.2d 1060, 1063 (C.A. 3, 1972).

irreparable harm would flow from denial of an injunction. In addition, the trial judge must consider the inconvenience that an injunction would cause the opposing party, and must weight the public interest as well." *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (C.A.D.C., 1969).¹⁸ The "burden of establishing the right to preliminary injunctive relief" is the movant's. *Moore, op cit.* 65-61, ¶ 65.04(3); *Pauls v. Secretary of Air Force*, 457 F.2d 294, 298 (C.A. 1, 1971). A preliminary injunction does not issue unless and until the court, upon careful consideration of the many factors that are relevant to the exercise of equitable power, concludes that the movant has shown a "reliable factual basis therefor" and concomitant legal and equitable warrant. *Moore, op. cit.*, 65-65, ¶65.04 (4); *Pauls v. Secretary of Air Force*, 457 F.2d 294, 298 (C.A. 1, 1971).

This Court's decision in *Boys Markets* does not dispense with, but emphasizes the need to consider, "whether issuance of an injunction would be warranted under ordinary principles of equity . . ." (398 U.S. at 254). But it does more. It allows the issuance of a strike injunction only to prohibit a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement. *Id.* at 253-254. And "the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike" *Id.* at 254.

In this case there has never been any hearing inquiring into the justifiability of the issuance of a *Boys*

¹⁸ See also, *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (C.A.D.C., 1969); Wright & Miller, *Federal Practice and Procedure: Civil*, Vol. 11, § 2948, pp. 427-466 (West 1973).

Markets injunction. Indeed, the crux of the controversy between the parties was whether there was any agreement which bound the Union at all (*supra*, pp. 3, 5-6, 7-8, 10, 31, *infra*, pp. 21a-51a), and there was no hearing at any stage on this crucial question (*supra*, p. 10). The slightest relevant factual inquiry would have disclosed that the parties were locked in a contract-no contract controversy, and the slightest relevant legal inquiry would have demonstrated that the issuance of a strike injunction in such a dispute was outside the compass of *Boys Markets* and therefore beyond the power of the District Court (*infra*, pp. 44-47).

Accordingly, there was neither notice nor opportunity for hearing which notice implies, each of which is the indispensable precondition to the issuance of a preliminary injunction. And the want of a hearing is especially egregious in view of the specific requirement of section 7 of the Norris-La Guardia Act. That section unequivocally provides that:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered

An evidentiary hearing is fully consistent with the objective of a *Boys Markets* remedy, and therefore the command of section 7 requiring it ¹⁹ remains in full force (*supra*, pp. 31-32).

¹⁹ See, *Milk Wagon Drivers Union Local 753 v. Lake Valley Farm Products*, 311 U.S. 91, 100 (1940).

4. Rule 52(a) of the Federal Rules of Civil Procedure requires that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." The requirement is without qualification and applies with respect to all preliminary injunctions.²⁰ In this case no findings of fact and conclusions of law were made at all. None were prepared for the District Court; none were requested by the District Court; none were made by the District Court. The egregiousness of this default is again emphasized by the cross-light which section 7 of the Norris-LaGuardia Act throws. That section requires that particular findings be made all of which, were any strike injunction allowable at all, would be applicable to this action except that embraced by subpart (e) (*infra*, pp. 3a-4a). But there were no findings of fact and conclusions of law of any kind despite the command of both Rule 52(a) and section 7.

5. Plainly, then, the order denying the motion to dissolve cannot be treated as a preliminary injunction, for none of the prerequisites essential to the grant of a preliminary injunction had been satisfied. The order can acquire the status of a preliminary injunction only by the invention of some new legal doctrine. And this indeed seems to be petitioners' claim, for they appear to assert that in every instance denial of a motion to dissolve a temporary restraining order constitutes *ipso facto* the grant of a preliminary injunction so long as

²⁰ *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); *Consolidated Coal Co. v. Disabled Miners of Southern West Virginia*, 442 F.2d 1261, 1270 (C.A. 4, 1971); *National Mediation Board v. Air Line Pilots Association*, 323 F.2d 305 (C.A.D.C., 1963); *Carpenters District Council v. Cicci*, 261 F.2d 5, 7 (C.A. 6, 1958).

the ruling was preceded by hearing on notice (br. pp. 24-27). But petitioners plainly admix a number of discrete considerations none of which is apposite in the present case.

The question of characterization of an order often arises in determining its appealability, a preliminary injunction being appealable while a temporary restraining order ordinarily is not. *E.g.*, *Weintraub v. Hanrahan*, 435 F.2d 461, 462-463 (C.A. 7, 1970). The cases upon which petitioners rely are of this kind.

Thus, sometimes a motion to dissolve a restraining order may be based on grounds identical to those which would support denial of a preliminary injunction, and the ensuing proceeding may therefore in actuality become the functional equivalent of a hearing on a preliminary injunction. As suggested in *Wright & Miller, Federal Practice and Procedure: Civil*, Vol. 11, § 2954, p. 523 (West, 1973):

In some situations the parties may find that they are prepared to offer sufficient evidence at a hearing to modify or dissolve the temporary restraining order so that in effect, the proceeding becomes a hearing on a preliminary injunction. If this occurs, the court should proceed with the hearing as if it were under Rule 65(a).

A variant is illustrated by *Morning Telegraph v. Powers*, 450 F.2d 97 (C.A. 2, 1972), cert denied, 405 U.S. 954 (1972). There the court noted that "the practical effect of the refusal to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief," for there had been "not once but three different times" upon which the defend-

ant "was heard on the propriety of preliminary relief." 450 F.2d at 99. Situations of this kind exemplify the rule that "the label put on the order by the trial court is not decisive" in determining whether it may be treated as a preliminary injunction for purposes of appealability. Wright & Miller, *Federal Practice and Procedure: Civil*, Vol. 11, § 2962, p. 619 (West 1973); see also, *Stricklin v. Regents of University of Wisconsin*, 420 F.2d 1257, 1259 (C.A. 7, 1970).

Ordinarily, however, a ruling on a motion to dissolve a temporary restraining order is no more than that, and even for purposes of appealability it is not characterized as a preliminary injunction without special reason. See, *Leslie v. Penn Railroad Co.*, 410 F.2d 750 (C.A. 6, 1969). The solution in a particular case turns on its own circumstances viewed in the light of considerations appropriate to allowing or denying interlocutory appeals.²¹ Furthermore, even where a restraining order is given the status of a preliminary injunction for purposes of allowing an appeal, "there is no reason why the order then must become a preliminary injunction for all purposes. Indeed, . . . in some instances it may be improper to do so because the requirements for obtaining a preliminary injunction will not be satisfied." Wright & Miller, *Federal Practice and Procedure: Civil*, Vol. 11, § 2953, p. 520 (West, 1973).

²¹ See, e.g., *Lowe v. Warden & Commissioner of Holman Prison Unit*, 450 F.2d 9, 11-12 (C.A. 5, 1971); *Smith v. Jackson State College*, 441 F.2d 278, 279 (C.A. 5, 1971); *Belknap v. Leary*, 427 F.2d 496, 498 (C.A. 2, 1970); *Wirtz v. Powell Knitting Mills Co., Inc.*, 360 F.2d 730 (C.A. 2, 1966); *Woods v. Wright*, 334 F.2d 369, 373 (C.A. 5, 1964); *Ross v. Evans*, 323 F.2d 160 (C.A. 5, 1963); *Connell v. Dulien Steel Products*, 240 F.2d 414 (C.A. 5, 1957); *Sims v. Greene*, 160 F.2d 512 (C.A. 3, 1947).

In this case there is of course no question of appealability. Accordingly, the learning pertaining to characterization of orders for that purpose is quite beside the point. Therefore, petitioners can muster no genuine support for their extraordinary claim that denial of a motion to dissolve a temporary restraining order heard after notice serves without more to convert the order into a preliminary injunction.

6. The upshot is plain. It would be altogether fictive to give the "Order Denying The Motion To Dissolve State Court Temporary Restraining Order" the status of a preliminary injunction. It simply continued the restraining order in effect for the additional three days of life it had before it expired by operation of law. At most, it constituted a declaration of power to issue a preliminary injunction, not the exercise of that power. There was neither notice, hearings, nor findings which could make more of it than that.

7. One final consideration merits mention. The District Court's ruling states no more than that "It Is Ordered that the motion to dissolve the State Court temporary restraining order is Denied" (R. 56). The import of that order is at best completely uncertain. It is not possible to know from its terms that it is expected to operate as a preliminary injunction to endure until final disposition of the cause rather than as a simple preservation of the life of the order for the three additional days it still had to run when its dissolution was denied. It is therefore clearly too vague to support an adjudication in criminal contempt, for no one can know with any sureness for what period the command it implicitly expresses is to last. It thus falls within the condemnation of the principle this Court enunciated in *International Longshoremen's*

Association v. Philadelphia Marine Trades Association,
389 U.S. 64, 76 (1976):

The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring [in Rule 65(d) of the Federal Rules of Civil Procedure] that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.

See also, *Terminal Railroad Association v. United States*, 266 U.S. 17, 29 (1924).

B. Considered as the Grant of a Preliminary Strike Injunction, the Order Denying the Motion To Dissolve the Temporary Restraining Order Would be Void and Could Not Support a Criminal Contempt Adjudication.

There is a supreme irony in the attempt to support the adjudication in criminal contempt by treating the temporary restraining order as if it had been converted into a preliminary injunction by denial of the motion to dissolve it. For were the order denying the motion to dissolve to be given the effect of a preliminary injunction it would constitute a void order which could not support an adjudication in criminal contempt. As a preliminary injunction, it would on the face of the papers have been an order beyond the power of the court to issue, and it would have been entered without notice and hearing of any kind upon the issue in dispute. The combination of lack of power and fundamental want of procedural due process produces a void order which there is no duty to obey.

As to want of power, section 4(a) and (e) of the Norris-LaGuardia Act provides that:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

* * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence. . . .

This flat denial of power to grant a strike injunction is lifted only to the limited extent of allowing issuance of a strike injunction to prohibit a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 253-255 (1970). This narrow holding is emphasized by the conditions which must be satisfied before even such a limited strike injunction may be granted (*id.* at 253-254):

Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance. The dissenting opinion in *Sinclair* suggested the following principles for the

guidance of the district courts in determining whether to grant injunctive relief—principles that we now adopt:

“A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.” 370 U.S., at 228. (Emphasis in original.)

Accordingly, “in order to enjoin a labor dispute the court must find that both parties are required to arbitrate the dispute and the employer should be so ordered as a condition to such relief.” *Emery Air Freight Corp. v. Local Union 295, Teamsters*, 449 F.2d 586, 589 (C.A. 2, 1971), cert. denied, 405 U.S. 1066 (1973); see also *Teamsters Local Union No. 795 v. Yellow Transit Freight Lines*, 370 U.S. 711 (1962); *Amstar Corp. v. Meatcutters*, 468 F.2d 1372 (C.A. 5, 1972); *Parade Publications v. Philadelphia Mailers Union No. 14*, 459 F.2d 369 (C.A. 3, 1972); *Standard Food Products Corp. v. Bradenberg*, 436 F.2d 964 (C.A.

2, 1972); *United States Steel Corp. v. United Mine Workers*, 74 LRRM 2611 (C.A. 3, 1970); *L. A. Concrete Pumping v. Majich*, 84 LRMM 2652 (D.C.C.D. Cal., 1973), same case, 84 LRRM 2653 (D.C.C.D. Cal., 1973), stay denied pending appeal, 84 LRRM 2655 (C.A. 9, 1973); *Pullman, Inc. v. Boilermakers*, 354 F.Supp. 496 (D.C.E.D. Pa., 1972); *Simplex Wire & Cable Co. v. IBEW Local 2208*, 314 F. Supp. 885 (D.C.N.H., 1970).

The underlying controversy in this case had nothing to do with a breach-of-contract strike over an arbitrable dispute. The dispute, on the contrary, centered on the question of whether or not there was a contract at all (*supra*, pp. 3, 5-6, 7-8, 10, 31; *infra*, pp. 21a-51a). The Union claimed that there was no existing contract, that it sought a new contract, and that its strike was in support of its demand to negotiate to which the employers had refused to accede. The employers, on their part, claimed that there was an existing contract to which the Union was bound and that therefore they were not required to negotiate in accordance with the Union's request. A strike in support of the Union's position in this contract-no contract controversy is wholly outside the sphere of "a strike over an arbitrable grievance" (*Boys Markets*, 398 U.S. at 254), and section 4 of the Norris-LaGuardia Act continues therefore to divest a federal court of power to enjoin the strike. As the Court of Appeals for the Second Circuit explained in an exactly comparable situation (*Emery Air Freight Corp. v. Local Union 295, Teamsters*, 449 F.2d 586, 591 (C.A. 2, 1971), cert. denied, 405 U.S. 1066 (1973)):

Turning to the June 22 preliminary injunction first, we do not see how it can stand under the governing law. It is quite clear that the major

dispute between the parties was whether a new contract existed. It was precisely this dispute which led to the impasse in negotiations and to the original call to strike on Thursday, April 22. Indeed, the trial court recognized this in its April 26 opinion. This dispute was not arbitrable because Emery and Local 295 had never agreed to make it so. Emery does not claim that this was an arbitrable question and the trial court did not so find. That the issue whether a new contract existed was decided by the court on June 11, after the evidentiary hearing of April 30, if anything, shows that no one regarded that issue as arbitrable. Therefore, under the Norris-LaGuardia Act, and the *Boys Markets* reading of it, the preliminary injunction was improper because the "strike * * * sought to be enjoined * * * [was not] over a grievance which both parties are contractually bound to arbitrate." 398 U.S. at 254, citing *Sinclair Refining Co. v. Atkinson*, 370 U.S. at 228 (dissenting opinion).

Accordingly, in this case, were the District Court's denial of the motion to dissolve the temporary restraining order to be treated as a preliminary injunction prohibiting the strike, it would constitute a strike injunction that "No court of the United States shall have jurisdiction to issue . . ." (§ 4, Norris-LaGuardia Act).

Therefore, considered as a preliminary strike injunction, the order would have been clearly beyond the competence of the court to grant. This want of power would have been brigaded with utter failure to afford any notice and opportunity for hearing to show that power to issue the injunction was lacking. As the Union represented without contravention, "the temporary restraining order issued by the Superior Court . . . was issued without any kind of a hearing and with-

out any arguments on the merits at all (Tr. 15, *infra*, p. 16a); similarly, "the question of whether or not there is a contract between Local 70 and the various companies involved" is a matter as to which "There's never been any evidence presented" to the District Court either on the motion to dissolve or in the contempt proceeding (Tr. 78, *infra*, p. 17a); indeed, the District Court positively refused to receive evidence on the matter at the contempt hearing (Tr. 79, *infra*, p. 18a). Accordingly, there was never any notice or hearing on the critical issue of the District Court's want of power to issue a strike injunction in this contract—no contract controversy.

The combination of want of power and denial of procedural due process to show that want of power produces a void order which will not support a criminal contempt adjudication for failure to comply with it. It may no longer be uncritically true that "When . . . a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing in contempt is equally void." *Ex parte Fisk*, 113 U.S. 713, 718 (1885). But neither is it uncritically true that obedience is due to any order granted under any circumstances simply and solely because the issuing court has personal and subject matter jurisdiction. A lawless order is as much an affront to the rule of law as disobedience of it. And when the invalidity of the order, substantively and procedurally, is as patent as it would be here were the order given the status of a preliminary strike injunction, the balance must be struck in favor of freedom from fealty to a void command.

First, in this case, the want of power is crystal clear; the divestiture of power is fundamental; it is a basic part of the scheme by which Congress orders both the judicial process and industrial relations in this country; and the limited and circumspect accommodation worked by *Boys Markets* emphasizes the lack of power in any circumstances outside its compass. Accordingly, in this case, want of power to issue a strike injunction in this contract-no contract controversy admits of no "substantial doubt," *Boys Markets* itself having by prior and exact adjudication eliminated any possible question (cf., *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947) (opinion of Vinson, C.J.)); the federal court thus operated under an "obvious limitation" on its power, and exercise of "power that has unquestionably been withheld" does not produce an order to which obedience can be exacted (*id.* at 310 (opinion of Frankfurter, J.)). Second, given the crucial issue of absence of judicial power, procedural due process to contest its exercise must be afforded; its grant is indispensable to the existence of any duty to obey an otherwise void order of the issuing court. *In re Green*, 369 U.S. 689 (1962). For lack of power plus lack of procedural due process deprives the proceeding of any genuine claim to judicial caliber. A court which couples exertion of power it does not have with denial of notice and hearing does not act as a court at all. In these circumstances the judge "would be a pretender to, not a wielder of, judicial power." *United States v. United Mine Workers*, 330 U.S. 258, 310 (1947) (opinion of Frankfurter, J.). Lastly, unlike *Walker v. Birmingham*, 388 U.S. 307, 315, 318-319 (1967), the Union did here seek dissolution of the temporary restraining order, and did not act until long after it had every reason to suppose that

the order had "expired" by operation of law. *Cf., United States v. United Mine Workers*, 330 U.S. 258, 294 (1947) (opinion of Vinson, C.J.). There was thus no contumacious attitude which might to some degree offset the lack of power and want of procedural due process which otherwise plainly existed.

The upshot is that the adjudication in criminal contempt cannot possibly be supported by treating the temporary restraining order as a converted preliminary injunction. For on that premise the order is void and has no redeeming value which might justify a requirement that it must nevertheless be obeyed willy-nilly.

III. THE SUMMATION.

Acceptance of petitioners' view would result in a legal horror. A state temporary restraining order of limited duration would be converted into a strike injunction of unlimited duration merely by the act of removal; the denial of the motion to dissolve would seal the conversion without any opportunity to be heard on the federal court's lack of power to grant a strike injunction; and failure to comply with an order which at the very least one had every reason to suppose had expired and which the federal court could not issue or continue at all would be the basis of a criminal contempt conviction resulting in a \$50,000 fine in the name of the need to preserve and vindicate judicial supremacy (R. 100-101). What emerges is the subversion of every juridical value which this case touches. To use removal as the means of converting an order of limited duration into one of unlimited duration has no support in any policy underlying removal; instead, "it assigns to removal proceedings a totally unintended

function," and operates "to effect a wholesale dislocation in the allocation of judicial business between state and federal courts" by working a result which neither court acting independently would sanction. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 246-247 (1970). It recreates every mischief which the Norris-LaGuardia Act was designed to suppress—substantive freewheeling and procedural precipitance—²² with no countervailing policy of any sort to be served by the regression. *Id.* at 249-253. And the result does not vindicate but would affront the dignity of law.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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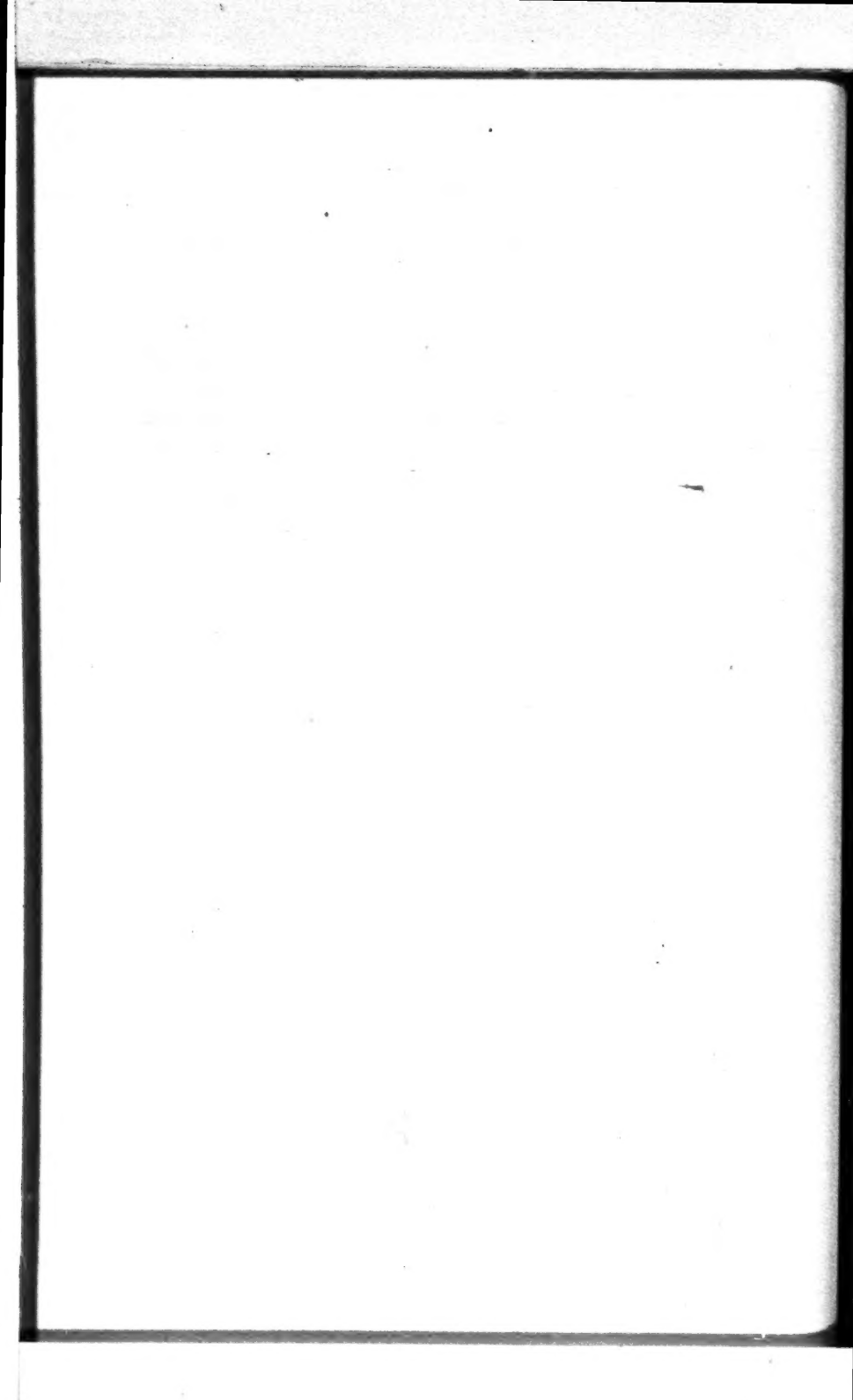
912 Dupont Circle Building,

N.W.

Washington, D.C. 20036

December, 1973

²² Frankfurter and Greene, *The Labor Injunction* (1930); Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638 (1932); Aaron, *Labor Injunctions In The State Courts—Part II: A Critique*, 50 Va. L. Rev. 1147, 1156-58 (1964); Cox and Bok, *Labor Law*, 70-76 (7th ed. 1969).



APPENDIX

APPENDIX

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APPENDIX A

RELEVANT STATUTORY PROVISIONS

A. *The Federal Rules of Civil Procedure* provide in relevant part that:

Rule 52. Findings by the Court.

(a) **EFFECT.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . .

• • •

Rule 65. Injunctions**(a) PRELIMINARY INJUNCTION.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied to save the parties any rights they may have to trial by jury.

(b) **TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION.** A temporary restraining order may be granted without written or oral notice to the adverse party or his

attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

* * *

Rule 81. Applicability in General.

(c) **REMOVED ACTIONS.** These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. . . .

B. *The Norris-LaGuardia Act* (47 Stat. 70, 29 U.S.C. § 101) provides in relevant part that:

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or

committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof.

(b) That substantial and irreparable injury to complainant's property will follow.

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, includ-

ing all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

C. Section 527 of the California Code of Civil Procedures provides in relevant part that:

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complainant in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. . . .

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must

be ready to proceed and must have served upon the opposite party at least two days prior to such hearing a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. . . .

APPENDIX B

Excerpts From the Transcript of the Contempt Proceeding
Not Printed in the Joint Appendix.IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE: Hon. Alfonso J. Zirpoli, Judge

No. C-70-1057 AJZ

GRANNY GOOSE FOODS, INC., ET AL., *Plaintiffs*,

—VS—

BROTHERHOOD OF TEAMSTERS & AUTO-TRUCK DRIVERS,
LOCAL NO. 70 OF ALAMEDA COUNTY, ET AL., *Defendants*

* * *

[2] WEDNESDAY, DECEMBER 2, 1970—10:35 A.M.

THE CLERK: Civil Case No. 70-1057, Granny Goose Foods, Inc., et al., versus Brotherhood of Teamsters and Auto-Truck Drivers, Local No. 70, et cetera, et al.; motion for contempt judgment.

Counsel will please state their appearances for the record.

MR. TICHY: For plaintiffs, Littler, Mendelson & Fastiff, by Wesley J. Fastiff, George J. Tichy and J. Richard Thesing.

MR. BEESON: Duane B. Beeson for Defendant Local 70.

THE COURT: All right, you may proceed, gentlemen.

MR. TICHY: Your Honor, before we proceed, I would like to make an opening statement, if I may.

THE COURT: Yes.

MR. TICHY: If you may remember, this was a proceeding which was initiated in State Court. There was a temporary restraining order issued, the matter was removed to Federal Court, on May 28, 1970, or May 27, 1970.

THE COURT: May 27.

* * *

MR. TICHY: Right. There was a motion to dissolve the modified temporary restraining order. This motion was [3] brought by the defendants in this case and the matter was submitted. And prior to the time of submission, the

Court was asked a very pertinent and germane question by Mr. Van Bourg, who was at that time arguing for defendants. And he asked what he should tell his clients about the status of this injunction, because he felt that the status of this injunction was that the Court was without jurisdiction to maintain its effectiveness, and therefore his clients were not bound by it. At that time you told him—

MR. BEESON: Your Honor, may I interject for just a moment? Because I think we are getting into an area that is going to preempt what I should bring to the attention of the Court as a threshold matter.

THE COURT: What is the threshold matter?

MR. BEESON: Your Honor, I am not prepared to go ahead today, and I would like to ask for a continuance for a reasonable time.

THE COURT: Well, let me make one observation in that regard, if I may.

MR. BEESON: Yes, Your Honor.

THE COURT: On the late afternoon of Monday, November 30, 1970, I believe it was Mr. Kenneth N. Silbert—

MR. BEESON: Yes, he is of our office.

THE COURT: Of your office?

MR. BEESON: Yes.

[4] THE COURT: One of the attorneys of record for the defendants in this case, and the respondents on this petition, appeared in my chambers together with Mr. Tichy, attorney of record for the plaintiffs, and acting for the plaintiffs.

And in the course of the discussion in chambers, when requested to give a hearing date on the order to show cause to be issued herein, he stated to the Court, after the Court had indicated the posture of its calendar and the fact that it would be able to hear this matter on Wednesday morning, December the 2nd—Counsel Silbert related that such statement was adequate notice and would be deemed notice to his clients. And I now certify that to be the record.

MR. BEESON: Well, of course, I am at a disadvantage here, Your Honor, and I would like to make this statement, however. Mr. Silbert at the present time is appearing in a case in Santa Clara County which had been set for today for a long time. He is the only person who could appear there. He went down there last night, I should say he left the office last night, before we received any notice of the hearing today. The papers came into my office about six o'clock in the evening, and I received them personally.

I told Mr. Tichy over the telephone that it would be impossible for Mr. Silbert to be there this morning because of this court hearing where he is presently engaged.

[5] Now, he expects to be back, as I understand it, somewhere around the noon hour today. I am personally and presently engaged in a contempt proceeding before Judge Sweigert of this court, Your Honor, and I have to be there at two o'clock and am supposed to be handling papers for the two o'clock appearance right at this very moment. Mr. Silbert should be back some time during the noon hour.

THE COURT: But we have irreparable harm, if the allegations are true—we have irreparable harm that's being perpetrated upon the plaintiffs in this case. If the allegations are true, it's harm that's arising by reason of an open defiance of a continuing order of this Court which this Court deems, and has indicated to be, in full force and effect.

MR. BEESON: I can understand the position set forth in the papers.

THE COURT: If those allegations are correct, am I to countenance a situation that permits this continuous and daily irreparable harm?

MR. BEESON: My motion for continuance, Your Honor, would be just until this afternoon, in order to let Mr. Silbert, who can handle it and is prepared with respect to the facts, make the proper representations to the Court. That's all I can ask at this time. It seems to me, Your Honor, we may get into a very serious problem otherwise.

[6] I have a previous commitment to be before Judge Sweigert at two o'clock this afternoon. It's perfectly plain to me on the bare reading of the papers that this cannot possibly be finished today. There are a number of problems.

THE COURT: That remains to be seen.

MR. BEESON: Yes, I understand that. But that's certainly our position, and I think that the kind of representations that we will make to the Court will bear that out.

THE COURT: Let me see if I understand your position correctly.

MR. BEESON: Yes, sir.

THE COURT: Your present position is that you will be ready to proceed at two o'clock?

MR. BEESON: Yes, sir.

THE COURT: And there is no question with relation to notice?

MR. BEESON: No, Your Honor, we are not going to raise that. I just need somebody here who can handle the case.

MR. TICHY: Your Honor, if I may address myself to Mr. Beeson's position? Not only on Monday did Mr. Silbert indicate that he would have adequate notice if we proceeded today, but as late as yesterday, when I contacted him, that we would probably be proceeding at ten o'clock this morning, [7] he advised me that he would have this matter in San Jose and asked that the matter not be started here until about 10:30 or 11:00. And I said, "Okay, I will certainly agree to start this matter at 10:30 if you will be available."

And he said yes, he would and on that basis we called up your secretary and changed the time to initiate this proceeding from 10:00 o'clock to 10:30.

Now, the problem we have here, Your Honor, is that not only has the picketing begun in the Oakland area, but it has spread to San Francisco now. It's also spreading up into Sacramento. We have virtually terminated the operations of these companies.

THE COURT: Well, that's the gamble or risk that somebody may be taking. I don't know. If the facts all develop as you contend they do, and if there is merit to your position and the evidence and the records sustain it, then that's the risk that the respondents will have to take.

MR. TICHY: Well, Your Honor, the problem that we see is this.

THE COURT: I don't think that this is a matter to be treated lightly.

MR. BEESON: I certainly agree with you, Your Honor. In Mr. Silbert's behalf, I just want to say that when he left the office about 5:30 last night, he did not have any notice before him, because we discussed this matter, that this [8] was going on at 10:30 this morning. It wasn't until shortly after 6:00 o'clock that the papers came over.

MR. TICHY: Your Honor, foreseeing this possibility, we sent telegrams not only to the Union itself but to Mr. Beeson's office, advising that this matter would be scheduled for 10:30 this morning. I have before me a receipt from Western Union confirming delivery of this at 12:25 yesterday.

MR. BEESON: I haven't seen that telegram, whatever it is.

MR. TICHY: And I believe a copy of the telegram is attached to the affidavit of Mr. Wesley J. Fastiff, which is on file in this matter.

THE COURT: Well, we have received a message that Mr. Silbert will be here in thirty minutes.

MR. BEESON: In thirty minutes?

THE CLERK: That will be probably around 11:00 o'clock. It was about five minutes ago.

THE COURT: Under the circumstances, the Court will take a recess for fifteen minutes. All right.

MR. BEESON: All right, thank you.

[Recess.]

THE CLERK: Civil Case No. 70-1057, Granny Goose Foods, Inc., et al., versus Brotherhood of Teamsters and Auto-

Truck Drivers, Local 70, et al. Counsel will again state their appearances for the record.

[9] **MR. TICHY:** For the plaintiffs, Littler, Mendelson & Fastiff by Wesley J. Fastiff, George J. Tichy and J. Richard Thesing.

MR. BEESON: For the defendant, Duane B. Beeson and Kenneth N. Silbert.

THE CLERK: Thank you, Counsel.

MR. BEESON: Your Honor, Mr. Silbert has arrived and is in the courtroom, as you can see, and we are prepared to go ahead in accordance with the arrangements that were made.

We have one or two preliminary motions, however, to address to this matter.

THE COURT: What is your motion?

MR. BEESON: The first motion, Your Honor, which I will make—only because I have had an opportunity to read the papers and Mr. Silbert has not—this will be about the limit of my participation in this case.

The motion is to sever what appears to be the request to institute a contempt proceeding from the civil contempt proceeding, which also has been instituted by this motion.

As I read the motion, Your Honor, particularly paragraph 3, it requests the Court to institute both kinds of proceedings. Of course the motion can be made to bring the civil contempt, and it has been brought, and we are here upon that. I don't know whether we are actually here on criminal contempt yet, because, as I understand the law in this respect, [10] there has to be a request for the Court to institute, give leave to institute a criminal contempt proceeding.

THE COURT: An order to show cause will suffice.

MR. BEESON: Yes, that's perfectly true. And unless the Court appoints counsel specially to prosecute the matter, the United States Attorney would have authority, inherent authority to prosecute the matter. I mention this only be-

cause the two are different. Now, they have been combined in this motion, or this order to show cause, if you will, and my motion is to sever the two.

And I have what I consider to be very good ground for it.

THE COURT: Well, the Court will this morning treat the matter as a motion for criminal contempt. The matter has been properly noticed, it's before the Court on an order to show cause. I don't think the United States Attorney need be the prosecuting officer. The parties who were aggrieved may appear through their counsel, and they have noticed this matter for such contempt, and the Court will treat it as such. This will not preclude any rights they may have with relation to civil contempt or any claim of damages that they may have, if there are any, arising out of the conduct of the respondents—if their conduct merits any remedy by way of damages.

MR. BEESON: I think that takes care of the problem, [11] Your Honor. I was going to ask that the criminal matter go first and be severed, because the rules with respect to civil and criminal are different. We do run into problems that can become very difficult if you try to combine the two, and Judge Sweigert has followed the ruling that Your Honor has just made in severing the two.

THE COURT: I am proceeding at this time on the order to show cause as it relates to the claim of criminal contempt.

MR. BEESON: Yes. Then I understand all the ordinary rules applicable to criminal contempt will be applicable here?

THE COURT: Yes.

MR. BEESON: All right, that's the only motion that I have, Your Honor. I think Mr. Silbert wants to make a motion also at this time.

MR. SILBERT: Your Honor, I first would like to apologize to the Court for arriving late. I told Mr. Tichy that I had

a 9:30 hearing in San Jose, and I got back as quickly as I could from that.

THE COURT: All right. I hope you didn't have trouble with the rain.

MR. SILBERT: Well, there was some hail also, but it's okay.

I have two motions to make. One is, first of all, a request of the Court. The papers were served on us last night, I take it at 6:00 o'clock. I haven't seen them until [12] I walked in just now, and I have not had an opportunity to read the supporting affidavits or the other papers, and I would like to have an opportunity to do that before we proceed.

In addition to that, our primary defense in this case is one that is not a factual issue. Our primary defense is that there's no outstanding order.

THE COURT: Well, I made a ruling on that before, and I am satisfied that there is an outstanding order. I am satisfied that my ruling of June 4th, in which I denied the motion to dissolve on the ground of lack of jurisdiction, continues in full force and effect the order.

I am satisfied that Section 1450 of Title 28, United States Code, is applicable, and under the circumstances this is an indication to you exactly what the position of the Court is.

MR. SILBERT: Well, I had not understood that you had ruled on that point and I would—

THE COURT: Well, my order of June 4th On May 19 the defendants and respondents in this case—May 19th of this year—filed a petition to remove the case to the Federal Court, and with it they filed a motion to dissolve the injunction, on the theory that the Sinclair case applied and that therefore this Court was obligated to dissolve an injunction granted by a State Court.

[13] On June 1st, the Supreme Court of the United States handed down its decision in the Boys Market case and expressly and specifically overruled the Sinclair case, upon

which the defendant had been relying. Based upon that decision in the Boys Market case, on June 4th the Court entered its order in which it said:

"The controversy before the Court is clearly a labor dispute within the meaning of Section 301 of the National Labor Relations Act, as amended by 29 USC Section 185. Removal is proper under 28 USC Section 1441.

"In the prior hearing the Court denied plaintiff's motion to remand. The only issue now before the Court is whether or not the District Court is mandated to dissolve the State Court temporary restraining order. The Supreme Court decision in the recent case of *The Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, — U.S. — [June 1, 1970], is dispositive of the issue. Accordingly, It Is ORDERED that the motion to dissolve the State Court temporary restraining order is DENIED."

Dated June 4, 1970, signed by the Judge.

The effect of this denial of the motion to dissolve is to keep in full force and effect the temporary restraining [14] order issued by the Superior Court of the State of California in and for the County of Alameda. It remains in full force and effect by reason of the order and by reason of the operation and the provisions of Section 1450 of Title 28, United States Code, which in its pertinent language provides that:

"All injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the District Court."

Since the order of June 4th, the file does not reflect that the defendants have filed any responsive pleading by way

of answer or otherwise, or taken any other action in the premises. It may very well be that the peace in the labor and management department prevailed and made such actions seemingly unnecessary. But the plaintiffs have now come forward with a petition in which they set forth conduct which they allege to be in contempt of the Court's order.

The circumstances are such, and notice having been given and acknowledged, that the matter is now ripe for hearing before the Court, to ascertain from the facts presented to the Court whether in truth and in fact there has been a contempt of the injunction issued by the State Court, which becomes for all purposes an order of this Court subsequent to removal.

MR. SILBERT: Well, Your Honor, I understand your [15] ruling now. It's our position that the order, the temporary restraining order issued by the Superior Court, I believe it was issued on May 13—that was issued without any kind of a hearing and without any arguments on the merits at all. And according to Section 527 of the California Code of Civil Procedure, such temporary restraining orders are in effect for only fifteen days.

THE COURT: Well, the only thing is, 1450 is now controlling, that's Title 28 United States Code, not California practice.

MR. SILBERT: Right. Well, we do not understand Section 1450 to have the effect of expanding either the breadth or the length of a State Court order.

THE COURT: That order was never dissolved. It is in full force and effect.

MR. SILBERT: Well, on the grounds that we believe that there's no order outstanding now, I'd move that the order to show cause in this case be quashed.

THE COURT: The motion is denied.

MR. SILBERT: May I have time, then, to read the affidavits that have been filed before we proceed?

THE COURT: Yes.

MR. SILBERT: It will only take a few minutes.

THE COURT: All right, you may read the affidavits. You have in mind, Counsel, that the substance of the affidavits [16] was recited to you in chambers on the late afternoon of November 30th.

MR. SILBERT: Yes. They look much more extensive than anything that was stated in chambers.

THE COURT: All right.

• • •

MR. SILBERT: Your Honor, I have had a chance to read the papers.

THE COURT: All right, then, you may proceed, Mr. Tichy.

• • •

[77] THE COURT: Does the plaintiff rest?

MR. TICHY: At this time, Your Honor, plaintiff does rest. I wish to indicate that because of the urgency of this matter, we have chosen not to call additional witnesses with regard to the—

[78] THE COURT: Oh, all I am interested in is whether you rest or not.

MR. TICHY: Yes, we do.

THE COURT: You rest? All right, you may proceed.

MR. SILBERT: Your Honor, before I proceed, I have a motion to make.

THE COURT: Yes?

MR. SILBERT: The basis of this entire case is something we haven't heard very much about yet, and that's the question of whether or not there is a contract between Local 70 and the various companies involved. There's never been any evidence presented to the Court on that matter, either to this Court or to the Superior Court where the temporary restraining order was issued.

The only discussion of that at all that I can recall was a very brief one in Judge Lercara's chambers, and certainly it could not be called a full litigation of that issue.

The underlying question of law as to whether or not there is a contract is a rather unusual one for the Federal District Court. It's one that's commonly considered by the Labor Board. It's an unusual one for the District Court. That is a question as to whether or not the companies involved here were part of a multi-employer bargaining group, and whether or not because of their membership in that group they became parties to a national agreement. And also whether or [79] not Local 70 effectively withdrew itself from that multi-employer, multi-union bargaining situation. That case is currently pending before the Labor Board, the companies involved here filed charges with the Labor Board.

The Labor Board has issued a complaint and a trial is presently scheduled on that complaint on February 2.

The issue to be litigated there is whether or not there is a contract between these parties, and of course if the Labor Board finds that there was never any contract, there was no strike clause, there was no basis for the issuance of a temporary restraining order.

THE COURT: The Court does not deem that to be relevant to the contempt hearing presently before it.

MR. SILBERT: I understand that, Your Honor, but we feel that this is a case—first of all, we understand that in cases involving contract violations, or alleged contract violations, which are also arguably unfair labor practices, that the Federal District Courts have concurrent jurisdiction with the Labor Board, but we feel because of the unusual nature of this case, the entire proceedings should be decided by the Labor Board, rather than two different forums, where we can get conflicting decisions. And we would request as a matter of comity that this case be referred to the Labor Board and not decided by the District Court.

THE COURT: That request is denied. The restraining [80] order sought to preserve conditions until the cause could be determined, and obedience of the defendants would

have achieved this result. They have had full opportunity to comply with the order, but they have deliberately refused obedience, presumably, at least up to this point there is no evidence to the contrary, and determine for themselves the validity of the order.

Now, that's the language that I just read from the United States versus Mine Workers, and that pretty much is the legal posture in which we now find ourselves.

So now it's incumbent upon the respondents to proceed. Is there a responsible officer of the respondent here?

MR. SILBERT: Your Honor, I have a problem in that regard. As you know, we were first informed of this entire proceeding informally in your chambers, and that was a day and a half ago.

THE COURT: Well, there should be someone here. Didn't take them long to get people on the picket line, if the evidence is correct, including telephone calls at 5:00 a.m. That's a pretty good indication of the kind of resourcefulness that exists, that would enable them to have an officer here this afternoon.

MR. SILBERT: Well, Your Honor, I have had a chance to confer with the clients only very briefly, and I did that during the recess that we had for lunch. I have not had time [81] to confer with them to the extent we could prepare any kind of an adequate defense at this point.

There is also an additional problem, in that decisions of this kind, as far as the Union is concerned, should be made by its executive board, and they have not had time to consider it before their executive board.

THE COURT: Well, that's their responsibility. The matter is on for hearing now.

MR. SILBERT: I understand that, Your Honor.

THE COURT: And if you have some evidence, I am prepared to hear it. If you don't, the matter will be submitted.

MR. SILBERT: Well, Your Honor, I would request the continuance until Monday of next week, so that we can speak to our clients and have them consider their position and

how they would like to proceed, so that we can consider it.

THE COURT: In view of the urgency involved here, the request for continuance until next Monday is denied.

Now, are you prepared to go ahead?

MR. SILBERT: Well, I have a very bad problem, Your Honor. My clients are involved in another court proceeding in Judge Sweigert's courtroom.

THE COURT: Well, I haven't heard of any reason why your clients, with whom you were presumably in contact at noon, couldn't be here to proceed, so I am ready to rule if [82] you aren't ready to give me any evidence.

MR. SILBERT: We feel this is a very serious matter for the Union, and we would like to present a defense. And I don't feel that in the short amount of time we have had, that short notice we have had, we can adequately represent our clients at this time. I cannot proceed with any defense.

THE COURT: All right, then, considering the nature of the case, the urgency involved, the case is submitted and I am going to make a ruling now.

[The ensuing and concluding parts of the transcript of the contempt proceeding are printed at pages 96-102 of the Joint Appendix.]

APPENDIX C

195 NLRB No. 120

D-5956

Oakland, Calif.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL
No. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA**

and

Case 20—CB—2227—1

GRANNY GOOSE FOODS

and

Case 20—CB—2227—2

**LADY'S CHOICE FOODS, DIVISION OF EARLY CALIFORNIA
FOODS, INC.**

and

Case 20—CB—2227—3

NATIONAL BISCUIT COMPANY

and

Case 20—CB—2227—4

STANDARD BRANDS, INC.

and

Case 20—CB—2227—5

SUNSHINE BISCUIT COMPANY

Decision and Order

On September 13, 1971, Trial Examiner Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed limited cross-exceptions and a brief in answer to the Respondent's exceptions and in support of the Trial Examiner's Decision, and the Charging Parties filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order¹ as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, Brotherhood of Teamsters and Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order, as modified herein:

1. Substitute the following for paragraph 1(a):

“(a) Refusing to give full force and effect to the National Master Freight Agreement and the Joint Council No. 7

¹ See *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (California Trucking Association, Inc.)*, 194 NLRB No. 106.

² The General Counsel contends the Trial Examiner's Order should specifically name the Charging Parties herein. We agree and will modify the Order accordingly.

The Charging Parties except to the Trial Examiner's recommended Order contending that the Trial Examiner failed to recommend that Respondent be ordered to mail copies of the notice to all of its members and that Respondent be ordered to read the notice to its membership at each of two consecutive monthly meetings. We agree that the Respondent should be ordered to send copies of the notice to its entire membership and will so provide; however, we do not believe that Respondent's conduct herein warrants that it be ordered to read the notice at its membership meetings.

Supplement thereto for the contract term April 1, 1970, to June 30, 1973, with respect to employees of Granny Goose Foods; Lady's Choice Foods, Division of Early California Foods, Inc.; National Biscuit Company; Standard Brands, Inc.; and Sunshine Biscuit Company in the following classifications: All drivers, hostlers, lift jitney operators, fork-lift operators, platform men, new furniture helpers, and helpers."

2. Substitute the following for paragraph 2(b) (the Trial Examiner's footnote 12 will be retained as set forth in his Decision).

"(b) Post at its union offices in Oakland, California, and distribute to its membership by mail or other means, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by one of Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

Dated, Washington, D.C.

February 17, 1973

John H. Fanning,	Member
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Howard Jenkins, Jr.	Member
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Ralph E. Kennedy,	Member
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NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD-(SF)-110-71
Oakland, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL
No. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

and

Case No. 20-CB-2227-1

GRANNY GOOSE FOODS

and

Case No. 20-CB-2227-2

LADY'S CHOICE FOODS, DIVISION OF EARLY CALIFORNIA
FOODS, INC.

and

Case No. 20-CB-2227-3

NATIONAL BISCUIT COMPANY

and

Case No. 20-CB-2227-4

STANDARD BRANDS, INC.

and

Case No. 20-CB-2227-5

SUNSHINE BISCUIT COMPANY

*Morton H. Orenstein, for the General Counsel
Wesley J. Fastiff, of Littler, Mendelson & Fastiff, of San
Francisco, Calif., for the Charging Parties.*

*Levy & Van Bourg, of San Francisco, Calif., by Victor J.
Van Bourg, Stewart Weinberg, and Michael B. Roger,
for Respondent.*

Trial Examiner's Decision**STATEMENT OF THE CASE**

STANLEY GILBERT, Trial Examiner: Based upon charges filed on April 20, 1970, by Granny Goose Foods, hereinafter referred to as Granny Goose; by Lady's Choice Foods, Division of Early California Foods, Inc., hereinafter referred to as Lady's Choice; by National Biscuit Company, hereinafter referred to as Nabisco; by Standard Brands, Inc., hereinafter referred to as Standard; and by Sunshine Biscuit Company, hereinafter referred to as Sunshine, in Cases Nos. 20-CB-2227-1, 20-CB-2227-2, 20-CB-2227-3, 20-CB-2227-4 and 20-CB-2227-5, respectively, the consolidated complaint herein was issued on October 30, 1970.

The complaint, as amended, alleges that Brotherhood of Teamsters and Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as the Respondent, violated Section 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act. By its answer, Respondent denies that it committed the unfair labor practices alleged in the complaint and, in addition alleges various affirmative defenses.

Pursuant to notice, a hearing was held in San Francisco, California, on March 16, 17 and 18, April 27, 28, 29 and 30, and May 3, 4 and 5, 1971, before the undersigned, duly designated as Trial Examiner. All parties were represented by counsel and filed briefs within the time designated therefor.

Upon the entire record in this proceeding and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT***I. The Business of the Companies Involved Herein***

The five companies involved herein are the Charging Parties. It is alleged in the complaint as follows:

(a) At all times material herein, Granny Goose, a California corporation with places of business located throughout the United States, including a facility located in Oakland, California, has been engaged in the processing, distribution and wholesale sale of potato chips and other food products.

(b) During the past year, Granny Goose, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of \$50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(c) At all times material herein, Lady's Choice, a California corporation with places of business located throughout the United States, including a facility located in Hayward, California, has been engaged in the processing, distribution and wholesale sale of pickles and other food products.

(d) During the past year, Lady's Choice, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of \$50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(e) At all times material herein, Nabisco, a Delaware corporation with places of business located throughout the United States, including a facility in Oakland, California has been engaged in the processing, distribution and wholesale sale of bakery products.

(f) During the past year, Nabisco, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of \$50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(g) At all times material herein, Standard, a Delaware corporation with places of business located throughout the United States, including a facility located in San Francisco, California, has been engaged in the processing, distribution and wholesale sale of food products.

(h) During the past year, Standard, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of \$50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(i) At all times material herein, Sunshine, a New York corporation with places of business located throughout the United States, including a facility located in Oakland, California, has been engaged in the processing, distribution and wholesale sale of bakery products.

(j) During the past year, Sunshine, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of \$50,000 from its facilities in the States of California directly to non-retail purchasers located outside the State of California.

By its answer, Respondent admits the foregoing allegations, and said allegations are found as facts herein.

As is admitted by Respondent, each of the above-mentioned employers has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

As is admitted by Respondent, it has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act and it has been affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein referred to as IBT.

III. The Unfair Labor Practices

Respondent admits, and it is found, as follows:

For a number of years, and at all times material herein, Respondent has represented a majority of the drivers, hostlers, lift jitney operators, forklift operators, platform men, new furniture helpers and helpers employed by each of the Charging Employers within Respondent's geographical jurisdiction and, by virtue of Section 9(a) of the Act, Respondent has been, and now is, the exclusive representative of all the said employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

Essentially the unfair labor practices litigated herein are whether or not Respondent violated Section 8(b)(3) and 8(b)(1)(B) of the Act by refusing to abide by a contract and supplement thereto¹ for the period April 1, 1970, to June 30, 1973, arrived at in multiunion-multiemployer bargaining negotiations which covered the aforesaid employees

¹ Referred to herein as the National Master Freight Agreement and its Joint Council No. 7 Supplement.

of the Charging Parties,² and by attempting to coerce each of the Charging Parties to bargain with it for a separate contract. As is set forth more fully below, a contract and supplemental agreement for 1970-1973 were negotiated by said multiunion-multiemployer bargaining unit. The record clearly establishes that Respondent refused to abide by said contract and supplemental agreement *vis-a-vis* the Charging Parties and sought to negotiate a separate contract with them. The primary questions³ to be resolved herein are whether Respondent and the Charging Parties were members of said multiunion-multiemployer bargaining unit and whether Respondent effected a timely withdrawal from said bargaining unit. There is little or no dispute as to the material facts, but rather as to what inferences may appropriately be drawn therefrom. The findings herein are based upon credited testimony and documentary evidence in the record.

² The allegation in the complaint that Respondent violated Section 8(b)(3) of the Act by refusing to accept and be bound by said 1970-1973 agreement and supplement thereto appears, by its language, to extend to other employers as well as the employers involved herein. However, it is not clear from the record herein that the parties attempted to litigate the question of whether Respondent's refusal extended to said other employers. It is not that said issue apparently was fully considered in Case No. 20-CB-2242, *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (California Trucking Association, Inc.)*, that Trial Examiner Herman Corenman issued his decision therein on August 4, 1971, TXD-(SF)-99-71, and that he found that Respondent violated Section 8(b)(3) and 8(b)(1)(B) of the Act by refusing to be bound by said agreement and supplement thereto and by coercive means sought to bargain individually with members of the multiemployer bargaining unit who were members of the California Trucking Association, Inc., an employer association whose representatives participated in said negotiations. The Charging Parties herein are not members of said Association.

³ Essentially these are the questions considered in Respondent's brief which recites that it "is addressed solely to the salient issues raised"

The Multiunion-Multiemployer Bargaining Unit

Commencing in 1964, it has been the practice in the trucking industry for representatives of a group of the various Teamsters locals and a group of various trucking employers to negotiate national agreements and supplemental agreements covering local areas. The Respondent has been one of the local Teamsters unions which participated in such bargaining which led to contracts and supplemental agreements for the periods 1964-1967 and 1967-1970.

As stated hereinabove, Respondent is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. IBT is divided into four geographical jurisdictions including the Western Conference of Teamsters which comprises locals in eleven western states including California. The Western Conference of Teamsters is further broken down into groups of various locals in certain geographical areas including a group known as Joint Council No. 7. Joint Council No. 7 embraces locals in the San Francisco Bay Area including Respondent which represents employees of various employers in the Bay Area including employees of the Charging Parties. The record is clear that Respondent was a member of the multiunion group which negotiated the 1964-1967 and 1967-1970 National Master Freight Agreements and the Joint Council No. 7 Supplements thereto.

The multiemployer group consists of various state and area employer associations as well as individual employers. An entity was formed called the Trucking Employers, Inc., herein referred to as TEI, which ultimately became the bargaining representative for the multiemployer group.

The Charging Employers' Membership in the Multiunion-Multiemployer Bargaining Group

It is the General Counsel's position, as well as that of the Charging Parties, that at the time negotiations started for the 1970-1973 contract and supplements thereto all of the

Charging Parties were members of the multiunion-multi-employer bargaining unit. On the other hand, the Respondent contends that they were not, that historically it has bargained with each of said Charging Parties individually. Hereinbelow is set forth a resume of the facts material to this dispute with respect to each of the said Charging Parties.

Granny Goose. On February 5, 1965, Granny Goose and Respondent entered into an agreement which provided as follows:

It is hereby agreed by and between: Granny Goose Foods, Inc.⁴ hereinafter called the Union, that the Employer hereby adopts and agrees to be bound by all the terms and conditions of the NATIONAL MASTER FREIGHT AGREEMENT, THE JOINT COUNCIL AND LOCAL 70 LOCAL PICKUP AND DELIVERY AGREEMENT, effective July 1, 1964, to and including March 31, 1967, except as hereinafter provided.

The terms of said agreement shall be altered as follows:

1. All references to the Association shall be considered deleted. In its place, the name of the individual employer signatory to this agreement shall be considered as substituted.
2. Article V, dealing with disputes and grievances, shall be referred to a committee consisting of two representatives of the Employer signatory to this agreement and two (2) representatives of the Union.

By letter dated January 6, 1967, Respondent wrote to Granny Goose as follows:

You are hereby notified that the NATIONAL OVER-THE-ROAD AND CITY CARTAGE POLICY AND NEGOTIATING COM-

⁴ Although this line is blank, it is apparent from the context that Respondent's name was understood to be in this blank space as the other party to the agreement.

MITTEE, the WESTERN CONFERENCE OF TEAMSTERS, and the undersigned LOCAL UNION as bargaining agents for the involved employees desire to negotiate changes or revisions in the NATIONAL MASTER FREIGHT AGREEMENT and in all AREA, REGIONAL and LOCAL SUPPLEMENTS, ADDENDAS, APPENDICES or RIDERS thereto for the contract period commencing April 1st, 1967 as provided in Article 37 thereof.

If you will not be represented in such negotiations by any Employer Association and desire individual notice of the time and place of future negotiating meetings, please advise this office and the office of the Western Conference.

We enclose herewith, a copy of Article XVI, Sections 4, 5 and 6, of the Constitution of the International Brotherhood of Teamsters so that you may be informed of the union's requirement for entering into a binding agreement.

Apparently Granny Goose made no reply to said letter. The record does not disclose that there was any communication, written or verbal, between Granny Goose and Respondent with respect to Granny Goose agreeing to be bound by the 1967-1970 national agreement and pertinent supplement thereto. It appears, however, that the parties adhered thereto.

Lady's Choice. By letter dated September 23, 1963, Respondent wrote to Lady's Choice as follows:

You are hereby notified that the National Over-the-Road and City Cartage Policy and Negotiating Committee and the undersigned Local Union, as bargaining agents for the involved employees, desire to terminate the Local 70 Local Pickup and Delivery Agreement for the contract period commencing July 1, 1964, and to enter into a National Agreement.

If you will not be represented in such negotiations by any Employer Association and desire individual notice

of the time and place of future negotiating meetings, please advise the office of the WESTERN MASTER FREIGHT DIVISION OF THE WESTERN CONFERENCE OF TEAMSTERS, Flood Building, Room 605, 870 Market Street, San Francisco, California.

On July 16, 1964, Lady's Choice executed a document which reads as follows:

By our signature hereby we signify our commitment to execute the National Master Freight Agreement and the Over-the-Road and Pick-Up and Delivery Supplements thereto for the period of July 1, 1964 to March 31, 1967, and to be bound by the terms and conditions thereof.

By letter dated June 9, 1967, Respondent notified Lady's Choice of the changes which were negotiated in the 1967-1970 national agreement and supplement thereto. It appears that Respondent and Lady's Choice adhered to the 1967-1970 national agreement and supplement thereto.

Nabisco. In a letter dated July 6, 1965, from Nabisco to Respondent, Nabisco wrote as follows:

It is hereby agreed that National Biscuit Company will be governed by the terms of the current Local Pick-up and Delivery Agreement, for the remainder of its present term, between California Trucking Associations, Inc., Drayman's Association of San Francisco and Brotherhood of Teamsters and Auto Truck Drivers Local 70 covering driver members of Local 70 who deliver National Biscuit Company products from their Emeryville, California Plant to retail outlets.

On December 12, 1966, James R. Hoffa, Chairman for the Teamsters Negotiating Committee, notified Nabisco that said committee "on behalf of each of the Teamsters Locals and affiliates, . . ." desired to negotiate changes and revisions in the terms of the national agreement and supple-

ment thereto for the contract period commencing April 1, 1967. Said letter further stated as follows:

If you will not be represented at such negotiations by any Employer Association, and desire individual notice of the time and place of future negotiation meetings, please so advise this office.

It appears Nabisco made no rely to the aforesaid letter. Similar notices with respect to negotiations on a national level and the area level were sent by Respondent to Nabisco asking if Nabisco desired notice of a time and place of negotiating meetings. It appears that Nabisco made no request for such notices. By letter dated July 10, 1967, from Nabisco to Respondent, Nabisco wrote as follows:

It is hereby agreed that the National Biscuit Company, Emeryville, California will be governed by the terms of the current Local Pick-up and Delivery Agreement, effective April 1, 1967, to and including March 31, 1970, between California Trucking Association, Inc., Drayman's Association of San Francisco and Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 covering the Drivers, members of Local Union No. 70, who deliver National Biscuit Company products from their Emeryville, California Plant to retail outlets.

Although the aforesaid letter of Nabisco with respect to the 1967-1970 contractual period refers only to "Local Pick-up and Delivery Agreement," which is titled "Joint Council No. 7 Local Pickup and Delivery Supplemental Agreement," it is noted that said supplemental agreement recites as follows: "This Agreement is supplemental to and becomes a part of the National Master Freight Agreement" It is further noted that the supplemental agreement by its terms does not constitute a complete bargaining agreement, and, therefore, it is considered that by its letter of July 10, 1967, Nabisco agreed to become bound by the terms and provisions of the national agreement as well as the Joint Council No. 7 Supplemental Agreement.

Standard. Standard and Respondent subscribed to an agreement on June 15, 1965, and July 9, 1965, respectively, which provided as follows:

It is hereby agreed by and between STANDARD BRANDS SALES COMPANY (subsidiary of STANDARD BRANDS, INC.) and TEAMSTERS LOCAL 70, hereinafter called the Union, that the Employer hereby adopts and agrees to be bound by all the terms and conditions of the NATIONAL MASTER FREIGHT AGREEMENT, THE JOINT COUNCIL AND LOCAL 70 LOCAL PICKUP AND DELIVERY AGREEMENT, effective July 1, 1964, to and including March 31, 1967, except as hereinafter provided.

The terms of said agreement shall be altered as follows:

1. All references to the Association shall be considered deleted. In its place, the name of the individual employer signatory to this agreement shall be considered as substituted.
2. Articles 8, and 42, dealing with disputes and grievances, shall be referred to a committee consisting of 2 (two) representatives of the employer signatory to this agreement and 2 (two) representatives of the Union.
3. This agreement is limited to the employer's employees known as local pickup and delivery drivers working out of 921 - 98th Ave., Oakland, California.
4. Holidays—New Year's Day
Washington's Birthday
Memorial Day
Fourth of July
Admission Day
Labor Day
Veteran's Day
Thanksgiving Day
Christmas Day

5. On dollar (\$1.00) per day in addition to the applicable rate in the National Master Freight Agreement will be paid to all drivers performing customer Yeast delivery service when such service requires the driver to determine the amount of Yeast the customer needs and/or how much he should bring on his next trip and/or when the driver puts away, rotates and/or unwraps the Yeast as a customer service.

By letter dated January 6, 1967, Respondent notified Standard of a desire to negotiate changes or revisions in the national and supplemental agreements for the period commencing April 1, 1967, and requested advice if Standard wished to be notified of the time and place of negotiating meetings. Standard did not request such notification. Apparently sometime in July 1967, Standard and Respondent entered into an agreement which provided as follows:

It is hereby agreed by and between STANDARD BRANDS SALES COMPANY (subsidiary of STANDARD BRANDS, INC.) and TEAMSTERS, LOCAL 70, hereinafter called the Union, that the Employer hereby adopts and agrees to be bound by all the terms and conditions of the NATIONAL MASTER FREIGHT AGREEMENT, THE JOINT COUNCIL AND LOCAL 70 PICKUP AND DELIVERY AGREEMENT, effective April 1, 1967, to and including March 31, 1970.

Said agreement included the alterations embodied in the aforesaid agreement entered into in 1965 as well as three additional alterations with respect to "overnight layovers," the pay scale and a penalty for discrepancies in employees' applications for employment.

Sunshine. By letter dated November 4, 1964, Sunshine wrote Respondent as follows:

It is hereby agreed that Sunshine Biscuits, Inc. will be governed by the terms of the current Local Pick-up and Delivery Agreement, between California Trucking

Associations, Inc., Drayman's Association of San Francisco and Brotherhood of Teamsters and Auto Truck Drivers Local 70, Alameda County, covering driver members of Local 70 who deliver Sunshine Products from their Oakland, California plant to retail outlets.⁵

By letter of January 6, 1967, Respondent notified Sunshine of a desire to negotiate changes in the national and supplemental agreements and requested advice as to whether Sunshine wished notice of the time and place of future negotiating meetings. Sunshine did not respond to said letter. By letter dated July 21, 1967, Sunshine wrote to Respondent as follows:

It is hereby agreed that Sunshine Biscuits, Inc. will be governed by the terms of the current National Master Freight Agreement, the Joint Council and Local 70 Pick-up and Delivery Supplemental Agreement, covering Teamster members of Local 70 who handle and deliver Sunshine Products from their Oakland, California plant to retail outlets.

It is concluded that all of the Charging Parties agreed to be bound by the terms of the National Master Freight Agreements and the Joint Council No. 7 Supplements thereto for the 1964-1967 and the 1967-1970 periods, to which Respondent was also bound. It appears that the Respondent does not dispute that fact, but, rather, argues that the history of its bargaining relations with the Charging Parties⁶ demonstrates that each one bargained indi-

⁵ For the reasons indicated hereinabove with respect to a similar agreement executed by Nabisco, it is considered that by this letter Sunshine agreed to become bound by the terms and provisions of the national agreement as well as the Joint Council No. 7 Supplement thereto.

⁶ Said history is summarized hereinabove.

vidually with Respondent and by adopting, on a "me too" basis, the agreements which had been negotiated by the multiunion-multiemployer groups they did not become members of the multiemployer group.

It is noted that the Board has held that mere adoption by an employer of an agreement which had been negotiated by a multiemployer group does not, without more, make the employer a member of the multiemployer bargaining unit. *Moveable Partitions, Inc.*, 175 NLRB No. 149. It is well established, however, that an employer becomes a member of a multiemployer bargaining unit when said employer enters into an agreement with the union in which it has clearly expressed a willingness to be bound by the multiemployer unit bargaining negotiations, *Weyerhaeuser Company*, 166 NLRB 299, even though there be a reservation requiring limited separate negotiations. *The Kroger Co.*, 148 NLRB 569, 574.

The 1964-1967 and the 1967-1970 National Master Freight Agreements contain the following provisions:

Article 1

Parties to the Agreement

Section 1. Employers Covered

The Employer consists of Associations, members of Associations who have given their authorizations to the Associations to execute this Agreement and Supplemental Agreements, members of Associations who have not given such powers of attorney, and individual Employers who become signatory to this Agreement and Supplemental Agreements as hereinafter set forth. The signatory Associations enter into this Agreement and Supplemental Agreements on behalf of their members under and as limited by their authorizations. [Underlining supplied.]

. . . .

Article 2

Scope of Agreement

Section 4. Single Bargaining Unit

The employees covered under this Master Agreement and the various Supplements thereto shall constitute one bargaining unit. It is understood that the printing of this Master Agreement and the aforesaid Supplements in separate Agreements is for convenience only and is not intended to create separate bargaining units.

This National Master Agreement covering city and road operations of the authorizing members of Trucking Employers, Inc., and the other Associations which have participated in the collective bargaining have resulted from joint collective bargaining negotiations as to common problems and interests in respect to basic terms and conditions of employment, and such Master collective bargaining agreement and Supplements thereto cover a single bargaining unit for the purposes of collective bargaining. Accordingly, the Associations and Employers which are parties to this Agreement acknowledge that they are part of a multi-employer collective bargaining unit which is comprised of the following named Associations and those of their members which have or will authorize such Associations to represent them for the purpose of collective bargaining, and only to the extent of such authorization, and such other individual Employers which have or may singly become parties to the Agreement. [Underlining supplied.]

. . . .

Article 7

Local and Area Grievance Machinery

Provisions relating to Local, State and Area Grievance Machinery are set forth in the applicable Supplements to this Agreement.

. . . .

Article 31

Multi-Employer Unit

The undersigned Employer agrees to become a part of the multi-employer unit established by this National Master Agreement, and to be bound by the interpretations and enforcement of this National Master Agreement.

The Employer further agrees to participate in joint negotiations of any modification or renewal of this Agreement and to remain a part of the multi-employer unit set forth in such renewed Agreement. [Underlining supplied.]

It is concluded that by agreeing to be bound by the terms of the above-said agreements (which contained the above-quoted provisions of the national agreements), the Charging Parties clearly expressed a willingness to be bound by the negotiations of the multiunion-multiemployer groups and, therefore, were members of the multiunion-multiemployer bargaining unit.⁷ It is clear, and apparently the Respondent does not dispute, that the Respondent was a member of the multiunion group which negotiated the 1964-1967 and 1967-1970 National Master Freight Agreements and the Joint Council No. 7 Supplements thereto. Furthermore, it is apparent from the communications from Respondent to various Charging Parties notifying them of the desire to negotiate changes and revisions in the existing agreement for the periods 1967-1970 and 1970-1973 the Respondent considered itself and the Charging Parties to be members of the multiunion-multiemployer bargaining unit. (The communications with respect to the negotiations for the 1967-1970 agreement and supplement thereto are set forth hereinabove.) With respect to the negotiations for the 1970-1973 agreement by the multiunion-multiemployer groups, notices thereof were sent by the National

⁷ The changes noted in Respondent's agreements with Granny Goose and Standard, as set forth hereinabove, do not affect this conclusion. *The Kroger Co., supra*.

Committee on November 24, 1969, and by Respondent on December 19, 1969. Respondent's aforesaid letter contained, *inter alia*, the following:

If you will not be represented in such negotiations by any Employer Association and desire individual notice of the time and place of future negotiating meetings, please advise this office and the office of the Western Conference.

It appears that none of the Charging Parties made any response to either of the notices received from the National Teamsters Committee or the Respondent. It is concluded that by their silence each of the Charging Parties indicated their continued willingness to be bound by the negotiations of the multiunion-multiemployer groups for the 1970-1973 contracts.

Negotiation of the 1970-1973 Agreements

On November 17 and 18, 1969, and again on November 30 and December 1, 1969, the negotiating committee of the multiunion group met to discuss bargaining proposals to be made to the employer group. On December 7 and 8, 1969, two delegates from each of the 363 Teamsters locals comprising the multiunion group met and unanimously approved the proposals suggested by the negotiating committee. On January 7, 1970, the negotiating committee for the multiunion group met with the negotiating committee of the multiemployer group. At that meeting the two groups exchanged proposals. The negotiating committee for the multiunion group transmitted its proposals to the multiemployer group not only with respect to the national contract but also for the Joint Council No. 7 Supplemental Agreement.

Thereafter, negotiating meetings were held with respect to the national agreement at various times between February 2 and sometime in April 1970. Negotiating meetings were held with respect to the Joint Council No. 7 Supplemental Agreement between February 17 and March 13 in

which certain items were unresolved. These unresolved items were subsequently resolved on April 1 or 2 by the national bargaining committees. On April 29, the Teamsters negotiating committee met and approved the national agreement and the various area supplemental agreements including the Joint Council No. 7 Supplemental Agreement. On April 30, the national and supplemental agreements were approved by two representatives from each of the Teamsters locals in the multiunion group. Thereafter, a nationwide referendum vote of all Teamsters members was conducted by the Department of Labor and it determined thereby that the employees had ratified the agreements. In July 1970, the principal negotiators for the multiunion and multiemployer groups modified their agreement to provide for an additional wage benefit which resulted from a strike by a Chicago local.

Although it appeared during the course of the hearing that Respondent contested the allegation in the complaint that a new National Master Freight Agreement and Joint Council No. 7 Supplemental Agreement for the period April 1, 1970, to June 30, 1973, were entered into by the multiunion-multiemployer bargaining groups, no reference to this contention was made in Respondent's brief. In any event, it is concluded that said agreements were arrived at as above stated.

Respondent's Contentions

It appears from the record and from Respondent's brief that Respondent contends that the Charging Parties' employees are not covered by the aforesaid 1970-1973 agreements on two bases. The first basis for this contention (advanced by Respondent in its brief) is that the Charging Parties were not bound by the negotiations for the 1970-1973 agreements, since the bargaining history between the Respondent and the Charging Parties discloses that prior agreements were negotiated on an individual basis. As set forth hereinabove, there is no merit to this contention since it has been found that each of the Charging Parties had

entered into agreements with Respondent, as provided in the 1964-1967 and 1967-1970 contracts, that their bargaining be conducted by the multiunion-multiemployer groups.

The second basis for Respondent's contention is that, even if it were to be assumed that Local 70 and the Charging Parties were part of the multiunion-multiemployer bargaining unit, Respondent made a timely withdrawal from said unit. Respondent relies on its letter of January 28, 1970, to the various Charging Parties as constituting its timely withdrawal and argues that negotiations did not commence until February 3, 1970.

Respondent's aforesaid letter of January 28, 1970, stated as follows:

By letter of December 19, 1969, you were notified that the National Over the Road, City Cartage, Freight Garage, and Freight Office Policy and Negotiating Committee, the Western Conference of Teamsters, and the undersigned Local Union, desired to negotiate changes or revisions in the National Master Freight Agreement and in all area, regional and local supplements, addenda, appendicies or Riders thereto, for the contract period commencing April 1, 1970.

It is our undersatnding that you will not be represented in such negotiations by any Employer Association. Furthermore, the nature of your industry is such that it is not meaningful to conduct negotiations with you at the same bargaining sessions involving the National Master Freight Agreement and the Local Supplement thereto. For these reasons we intend to negotiate a separate agreement from the National Master Freight Agreement and Local Supplement with your industry.

Therefore, you are hereby notified that the undersigned Local Union, as bargaining agents for the involved employees, desire to negotiate changes or revisions in the National Master Freight Agreement and

in all Area, Regional and Local Supplements, Addenda, Appendices or Riders thereto for the contract period commencing April 1, 1970, as provided in Article 37 thereof. You are further notified that this notice applies to any separate agreement we may have covering freight, garage or freigh office employees.

Would you kindly respond to this letter within two weeks with our office, so that a time and place of negotiations can be agreed upon. It is hoped that a food industry agreement may be arrived at through negotiations at which all local food companies will be represented.

It appears that the Respondent by the aforesaid letter attempted to detach the Charging Parties from the multi-employer group as that it could conduct negotiations directly with the Charging Parties and other members of the "food industry" and set up a multiemployer bargaining unit of employers in said industry.

It is well established that an employer or a union may not withdraw from a multiemployer bargaining relationship after negotiations for a new contract are commenced, absent unusual circumstances, except by mutual consent.⁸ It does not appear that unusual circumstances existed in the instant case in view of the fact that there is no showing that the circumstances differed in 1970 from the circumstances which existed when the Charging Parties agreed to be bound by the 1964-1967 and 1967-1970 National Master Freight Agreements and Joint Council No. 7 Supplements thereto. The record will not support a finding that the Charging Parties consented to the abandonment by the Respondent and Charging Parties of the multiunion-multi-employer bargaining unit. On the contrary, three of the

⁸ *Retail Associates, Inc.*, 120 NLRB 388, 395; *The Evening News Association, Owner and Publisher of "The Detroit News,"* 154 NLRB 1494, 1501; *Sheridan Creations, Inc.*, 148 NLRB 1503, 1505; *John J. Corbett Press, Inc.*, 163 NLRB 154, 157; *Bill O'Grady Carpet Service, Inc.*, 185 NLRB No. 41.

Charging Parties, Granny Goose, Nabisco and Sunshine, sent letters to Respondent in reply clearly indicating that they did not consent to the abandonment of the bargaining unit and there is no credible evidence that the other two Charging Parties indicated their willingness to withdraw from the bargaining unit. Consequently, the only remaining issue to be considered is whether the January 28 letter was a timely notice, i.e., prior to commencement of negotiations.

As stated hereinabove, the negotiators for the multi-employer and multiunion groups met on January 7, 1970, and exchanged proposals for the 1970-1973 national agreement and supplements thereto (including the Joint Council No. 7 Supplement). It is the opinion of the Trial Examiner that negotiations commenced at that point and, therefore, it is found that the January 28 notice was not timely.⁹ Consequently, it is concluded that Respondent and Charging Parties remained members of the multiunion-multi-employer bargaining unit and were bound by the agreements arrived at in its negotiations.

The Picketing by Respondent

The record clearly demonstrates that Respondent engaged in picketing at the premises of each of the Charging Parties on various dates in 1970. Although Respondent denied the allegation in the complaint that such picketing occurred and that it was for the purpose of forcing or requiring the Charging Parties to bargain on an individual basis, Respondent offered no testimony in support of its said denial (either to the effect that the picketing did not occur or that it was not for the purpose stated).

⁹ In view of this finding, no purpose would be served in considering the issue of whether or not, had the notice been timely, it would have been effective to accomplish the partial withdrawal of Respondent from the multiunion group *vis-a-vis* the Charging Parties and thereby detach the Charging Parties from the bargaining unit.

The pickets carried signs reading: "Teamsters Local 70 on strike" and the name of the company being picketed. The picketing occurred at the premises of Granny Goose and Sunshine, May 14 through May 21, 1970, and at Standard and Nabisco from November 30 to December 3, 1970, and at Lady's Choice from December 1 to December 3, 1970.

Subsequent to Respondent's above-quoted letter of January 28, 1970, Respondent, commencing on April 9, 1970, sent a number of communications to each of the Charging Parties seeking negotiating meetings with them. None of the Charging Parties complied with the Respondent's request for such negotiations. The last of said requests was transmitted on November 9, 1970, to which counsel for the Charging Parties responded on that date by declining on their behalf, stating that they were covered by a collective-bargaining agreement to which Respondent was a party. Counsel for Respondent responded to said letter, by a letter dated November 13, 1970, stating, *inter alia*, "I am hopeful you will advise your client to enter into negotiations. If not, Local 70 feels that it has every right to press its position."

It is apparent that, commencing on January 28, 1970, and continuing to the date of the hearing, the Respondent took the position, and repeatedly notified Charging Parties, that it and the Charging Parties were not bound by the multi-union-multiemployer negotiations and that the Charging Parties should enter into a separate contract with it. It is concluded that Respondent engaged in the above-mentioned picketing to force the Charging Parties to accept its position. There is nothing in the record which would tend to support a finding of any other purpose. Respondent did not introduce any testimony intended to show that the picketing was for some purpose other than that of forcing the Charging Parties to abandon their position that they and the Respondent were bound by the multiunion-multi-

employer bargaining negotiations and the ensuing agreements.¹⁰

By its aforesaid picketing to force the Charging Parties to accept its said position, Respondent violated Section 8(b)(1)(B) and 8(b)(3) of the Act, and by refusing to abide by the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the period April 1, 1970, to June 30, 1973, violated Section 8(b)(3) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with the activities of the Charging Parties described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

It having been found that the Respondent has violated Section 8(b)(1)(B) and 8(b)(3) of the Act, it will be recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. All drivers, hostlers, lift jitney operators, forklift operators, platform men, new furniture helpers and helpers employed by members of the above-mentioned employer

¹⁰ Respondent's brief is silent with respect to the allegation of the picketing and its purpose.

group, including the Charging Parties herein, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. Respondent and the Charging Parties are, and at all times material herein were, members of the above-mentioned multiunion-multiemployer bargaining unit and were, with respect to employees of the Charging Parties whom Respondent represents, bound by the negotiations in said unit which resulted in the National Master Freight Agreement and the Joint Council No. 7 Supplemental Agreement for the contract period April 1, 1970, to June 30, 1973.

3. By refusing to be bound by said national agreement and supplement thereto with respect to the aforesaid employees of the Charging Parties, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(3) of the Act.

4. By picketing the Charging Parties for the purpose of detaching them from the multiemployer bargaining group and forcing them to bargain separately with it, the Respondent has restrained and coerced, and is restraining and coercing, the Charging Parties in the selection of their representatives for the purposes of collective bargaining or adjustment of grievances in violation of Section 8(b)(1)(B) of the Act and has refused to bargain collectively with them within the meaning of Section 8(b)(3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:¹¹

¹¹ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to give full force and effect to the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, with respect to employees of the Charging Parties in the following classifications: All drivers, hostlers, lift jitney operators, forklift operators, platform men, new furniture helpers and helpers.

(b) Seeking separate bargaining agreements from the Charging Parties for their employees covered under the aforesaid National Master Freight Agreement and Joint Council No. 7 Supplement thereto.

(c) Restraining and coercing the Charging Parties herein in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances by picketing or any other means.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Notify in writing each of the Charging Parties that it will adhere to and be bound by the terms of the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, and sign said agreements upon request.

(b) Post at its union offices in Oakland, California, copies of the attached notice marked "Appendix."¹²

¹² In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice, to be furnished by the Regional Director for Region 20, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Deliver to the Regional Director for Region 20 signed copies of said notice in sufficient numbers to be posted by each of the Charging Parties at their places of business, if said Employers are willing.

(d) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.¹³

Dated: September 13, 1971

/s/ STANLEY GILBERT
Stanley Gilbert
Trial Examiner

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to give full force and effect to the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, with respect to employees of GRANNY GOOSE FOODS; LADY'S CHOICE FOODS, DIVISION OF EARLY CALI-

¹³ In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

FORNIA FOODS, INC.; NATIONAL BISCUIT COMPANY; STANDARD BRANDS, INC.; and SUNSHINE BISCUIT COMPANY in the following classifications: All drivers, hostlers, lift jitney operators, forklift operators, platform men, new furniture helpers and helpers.

WE WILL NOT seek separate bargaining agreements from the above-named Employers for their said employees who are covered under the aforesaid National Master Freight Agreement and Joint Council No. 7 Supplement thereto.

WE WILL NOT restrain and coerce the above-named Employers in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances by picketing or by any other means.

WE WILL notify in writing each of the above-named Employers that we will adhere to and be bound by the terms of the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, and sign said agreements upon request.

**BROTHERHOOD OF TEAMSTERS AND
AUTO TRUCK DRIVERS LOCAL No. 70,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA
(Labor Organization)**

Dated By
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California, 94102. Telephone Number: 556-3197.

SUPREME COURT, U. S.

JUL 7 1974

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1973

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation, SUNSHINE
BISCUITS, INC., a corporation, and STANDARD
BRANDS, INC., a corporation,
Petitioners,

vs.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

WESLEY J. FASTIFF,
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THEORY OF THE EARTH

CHAPTER I

1890

The theory of the earth is a branch of geology which deals with the origin and development of the earth and its various parts. It is a science which seeks to explain the processes which have shaped the earth and its features. The theory of the earth is based on the study of the earth's history and its various parts. It is a science which seeks to explain the processes which have shaped the earth and its features.

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LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

I

RESPONDENT'S BRIEF RAISES ADDITIONAL ISSUES, NOT
PRESENTED TO THE COURT BELOW, WHICH CANNOT
PROPERLY BE CONSIDERED HERE

Respondent in its Brief raises certain issues which
it did not present to the Court of Appeals. Thus, Re-

spondent argues (Brief p. 18) that the district court's order denying Respondent's motion to dissolve the removed temporary restraining order did not constitute the granting of a preliminary injunction because the order was too vague to support the district court's subsequent criminal contempt order. Yet at no time either during the hearing on Petitioner's motion for contempt or during the proceeding in the Court of Appeals did Respondent contend that it was unable to understand the terms of the restraining order.

Further, Respondent contends (Brief pp. 17, 39) that the district court's denial of the motion to dissolve the removed order did not in effect convert that order into a preliminary injunction because no findings of fact and conclusions of law were filed in support of the court's order denying the motion. Respondent has not previously challenged the continuing effectiveness of the restraining order on the ground that the district court did not make such findings or conclusions, nor has Respondent ever contended that the basis of either the state court restraining order or the district court's order denying the motion to dissolve was unclear.

Respondent contends (Brief pp. 30-31) that the provisions of the Norris-La Guardia Act apply to the restraining order in this case, and that *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), which exempts certain actions under Section 301 of the Labor-Management Relations Act from the scope of the Norris-La Guardia Act, does not apply to this case. If in fact this is not a *Boys Markets* case, then the district court should have granted Respondent's

motion to dissolve the removed restraining order. However, Respondent did not raise that issue on appeal from the judgment of contempt, but presents it for the first time here.

Further, Respondent contends that even if *Boys Markets* is applicable to this case, *Boys Markets* does not exempt the restraining order from the procedural limitations of Section 7 of the Norris-La Guardia Act (Brief pp. 31-32). This contention is an obvious attempt to relitigate the scope of the *Boys Markets* decision, another issue not raised on appeal and not properly before this Court.

Respondent's attempt to bring before this Court on writ of certiorari additional issues not raised below contravenes the express provisions of Rule 40 1.(d) (2) and (3) of the Supreme Court Rules, 28 U.S.C. Rule 40 1.(d) (2) provides as follows:

"The phrasing of the questions need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented." [Emphasis added.]

Rule 40 3. provides that:

"The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the state-

ment of the other side, and except that items (a), (b), (c) and (d) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side." [Emphasis added.]

Thus, Rule 40 clearly prohibits the respondent, as well as the petitioner, from raising additional questions not raised in the court below.

This Court has accordingly held that it will not consider questions raised for the first time in the briefs on writ of certiorari. *J. I. Case v. Borak*, 377 U.S. 426, 428-429 (1964); *Irvine v. California*, 347 U.S. 128, 129-130 (1954). Accordingly, the additional issues raised by Respondent for the first time in its brief to this Court are not properly before the Court.

II

RESPONDENT'S CONTENTION THAT THE REMOVED RESTRAINING ORDER WOULD HAVE EXPIRED AUTOMATICALLY UNDER STATE LAW IS WITHOUT MERIT

Respondent contends (Brief pp. 12-13, 18-22) that the restraining order obtained by the Employers in state court would have expired automatically in 15 days under state law, or in 20 days if continued by the court for good cause. Respondent asserts that Section 527 of the California Code of Civil Procedure "unequivocally fixes the duration of a temporary restraining order at a maximum period of twenty days" (Brief p. 19).

In fact, if the state court finds good cause therefor, a temporary restraining order may be continued pending trial of the case, as the Employers pointed out in their opening Brief (pp. 6-7, n. 3); *McDonald v. Superior Court*, 18 Cal.App.2d 652, 656-657 (1937). The cases cited by Respondent in support of its contention that the temporary restraining order expires automatically at the end of 15 days, or a maximum of 20 days, are not to the contrary. Those authorities recognize that a restraining order may remain in effect for a longer period of time, if the court issues an order continuing the restraining order in effect. See, *Sharpe v. Brotzman*, 145 Cal.App.2d 354, 358-359, 302 P.2d 668 (1956).

Moreover, Section 527 of the California Code of Civil Procedure does not purport to impose any limitation on the duration of a temporary restraining order *unless that order is granted without notice* to the adverse party. In the instant case the Union was indisputably on notice that the Employers were seeking a temporary restraining order in the Alameda County Superior Court on May 15, 1970. In fact, counsel for the Union was present in the courtroom and presented argument on behalf of the Union (R. 50-51). The court made its ruling after considering the Union's argument as well as that of the Employers. Therefore, it cannot be said that the temporary restraining order was granted by the Superior Court without notice to the Union. In these circumstances, the time limitations on temporary restraining orders set forth in Section 527 of the California Code of Civil Procedure are inapplicable.

III

**THE REMOVED RESTRAINING ORDER COULD NOT HAVE BEEN
IN EFFECT WHEN THE DISTRICT COURT RULED ON RE-
SPONDENT'S MOTION TO DISSOLVE UNLESS SECTION 1450
CONTINUED THE ORDER IN EFFECT**

Respondent assumes (Brief pp. 13, 21) that when the district court denied Respondent's motion to dissolve the removed restraining order on June 4, 1970, the court was not performing a vain act—that is, that the restraining order was still in effect at that time. However, according to Respondent's reading of California Code of Civil Procedure, Section 527 (Brief pp. 12-13, 18-22), the restraining order would have expired automatically 15 days after issuance had the case proceeded in state court, and was subject to the same time limitation after its removal to federal court. If Respondent is correct, and the removed restraining order was subject to state law and expired 15 days after issuance, then on June 4, 1970, when the district court denied the motion to dissolve, there was no order in effect and the district court's order denying the motion was a superfluous act.

To avoid this embarrassment, Respondent argues (Brief pp. 19-21) that the restraining order had a maximum state life of 20 days and therefore expired on June 7, 1970, rather than June 2, 1970. Respondent reaches its conclusion on the basis of sheer speculation that had the case not been removed, the restraining order would probably have been continued for five days (Brief p. 20). Yet if Respondent's interpretation of Section 527 is correct, the restraining order could not have survived longer than 15 days except

by order of the court, issued upon a showing of good cause. No such continuance was sought or granted. Therefore, the removed order could not have been in effect on June 4, 1970, by force of *state law*.

Only by admitting that the removed restraining order was continued in effect by Section 1450 can Respondent assert, as it does (Brief p. 13) that on June 4, 1970, when the district court issued its order denying the motion to dissolve, the removed restraining order was in effect and had additional time to run. Both Respondent and the district court necessarily assumed that the removed order remained in effect by reason of the express provision of Section 1450.

IV

RESPONDENT'S INTERPRETATION OF SECTION 1450 IS CONTRARY TO THE LANGUAGE OF THE STATUTE AND UNSUPPORTED BY THE CASE LAW

Respondent contends (Brief pp. 13-15, 22-25) that Section 1450 has no effect on the duration of a removed restraining order, and that in fact the statutory language imports any time limitation which would have been imposed by state law. Thus, on page 14 of its Brief, Respondent argues that the "full force and effect" to which Section 1450 refers "can only be ascertained by reference to the state law which gave it birth and defines its attributes." To give a removed order "full force and effect," Respondent contends, means to observe its expiration date under state law (Brief p. 14). Respondent amplifies its argument on

page 22 of its Brief, asserting that an integral part of the removed state order which must be given "full force and effect" is any time limitation which would govern the duration of the order under state law. Respondent then cites a number of cases (Brief pp. 24-25) allegedly standing for the proposition that federal jurisdiction on removal is derivative and that removal cannot add to the duration of an injunctive order.

Respondent's interpretation of Section 1450 is at odds with the plain language of the statute. To read the phrase "full force and effect" as including the duration of a removed order, rather than its scope, would contravene the provision of Section 1450 that removed orders shall remain in effect "until dissolved or modified by the district court." That quoted phrase specifically provides for the duration of removed orders. The result of following Respondent's interpretation would be to make the statute internally inconsistent, or the above-quoted phrase superfluous.

The cases cited by Respondent in its Brief (pp. 24-25) do not support its contention that the duration of a removed order depends upon its duration under state law. Rather, those cases hold that if the state court lacks jurisdiction over the case at the time when the case is removed to federal court, the federal court does not acquire jurisdiction to hear the case. Thus, in *In re Chicago Rapid Transit Co.*, 192 F.2d 206 (7th Cir. 1951), a workmen's compensation claimant sought review of an arbitration decision in state court. The state court lacked jurisdiction to review arbitration

decisions. On removal, the federal court had no additional or different jurisdiction, and the case was dismissed. *A. J. Curtis & Company v. D. W. Falls, Inc.*, 305 F.2d 811 (3d Cir. 1962), involved substantially similar facts: The state court lacked jurisdiction over a petition to vacate or modify an arbitration award. Therefore, the federal court lacked jurisdiction to hear the petition on removal.

In *Beecher v. Wallace*, 381 F.2d 372 (9th Cir. 1967), the Ninth Circuit held that defective state process cannot be completed after the case is removed to federal court. Thus, the federal court lacked removal jurisdiction. See also, *Meyer v. Indian Hill Farm*, 258 F.2d 287, 290 (2d Cir. 1958); *Shoaff v. Gage*, 163 F.Supp. 179 (D. Neb. 1958). Similarly, removal does not create jurisdiction over the parties or subject matter where it was lacking in the state court. *Minnesota v. United States*, 305 U.S. 382, 389 (1939); *Lambert Run Coal Co. v. Baltimore & Ohio Ry. Co.*, 258 U.S. 377 (1922); *Koppers Company v. Continental Casualty Company*, 337 F.2d 499, 501-502 (8th Cir. 1964); *Dunn v. Cedar Rapids Engineering Co.*, 152 F.2d 733 (9th Cir. 1945). However, removal of the case from state to federal court does not vacate an order issued by a state court having jurisdiction of the parties and subject matter prior to removal. *Duncan v. Gegan*, 101 U.S. 810 (1880).

Respondent's assertion (Brief pp. 23-24) that the purpose of Section 1450 is to give to a removed order the same duration that it would have had under state law if the case had not been removed is unfounded. In

fact, a different rule for removed orders may have been adopted by Congress for the reason that the district court is not acquainted with the circumstances under which the state-court order issued, as the state court would have been. It may thus have been deemed fairer to the plaintiff, who must accept the defendant's decision to change forum, to continue the state-court order in effect, rather than to terminate it at any expiration date which state law might prescribe. If under Section 1450 the restraint were to continue in effect for a longer period than state law might have allowed, that is a risk which the defendant takes when it removes the case. Moreover, such a rule would encourage the defendant to seek an early determination of the merits of the state order by moving in district court to dissolve or modify the order.

V

RESPONDENT'S INTERPRETATION OF SECTION 1450 WOULD LEAD TO DISPARITY IN THE TREATMENT OF REMOVED ORDERS FROM STATE TO STATE

If, as Respondent urges (Brief p. 25), this Court were to hold that the duration of removed orders is dependent upon the provisions of state law, the result of that ruling would be to subject litigants in federal court to disparate treatment according to the provisions of local law. Thus, where state law imposes no restrictions on the duration of restraining orders, the injunction would continue in effect after removal until such time as the district court in fact dissolved

or modified it. In states where the operation of injunctive orders was sharply limited, the removed order would expire automatically concurrently with or immediately after removal. Thus, in some districts the plaintiff would have the protection of notice and a hearing on a motion to dissolve or modify the removed order before it lost the benefit of the order, while in other districts in other states the plaintiff would lose that benefit without such protection.

If, on the other hand, all removed orders were to remain in effect until the district court reviewed them and ordered their dissolution or modification, then litigants would not be subjected to disparate treatment according to the state from which the case was removed.

Moreover, this result would entail a fairer distribution as between plaintiff and defendant of the burden of moving the case on to a hearing. The plaintiff is not in a position to remove the case. However, the defendant, against whom the order is to run, has the option of proceeding in state court at an order to show cause hearing or removing the case to federal court. When the defendant chooses to remove the case, he deprives the plaintiff of a hearing in the lower court through no fault of the plaintiff's. It should, therefore, be incumbent on the defendant to bring the merits of the order on for hearing by moving to dissolve the order in federal court.

VI

THE DISTRICT COURT'S DENIAL OF RESPONDENT'S MOTION TO DISSOLVE THE REMOVED RESTRAINING ORDER CONSTITUTED IN EFFECT THE GRANTING OF A PRELIMINARY INJUNCTION AND RESPONDENT'S OBJECTIONS ON PURPORTED PROCEDURAL GROUNDS ARE NOT WELL TAKEN

Respondent contends (Brief pp. 16-18, 34-43) that the removed restraining order was not converted into a preliminary injunction by the district court's denial of Respondent's motion to dissolve the injunction because the district court's order allegedly lacked procedural safeguards imposed by Rules 52(a) and 65(a)(1) of the Federal Rules of Civil Procedure on the issuance of preliminary injunctions. Thus, Respondent argues (Brief pp. 16-17, 34-38) that "notice", in the sense of a hearing and an opportunity to oppose the injunction, was not given to Respondent at the time that its motion to dissolve the removed restraining order was heard and determined by the district court. Respondent further argues that the order denying its motion to dissolve could not have constituted the granting of a preliminary injunction because the district court failed to set forth findings of fact and conclusions of law in support of its order (Brief pp. 17, 39).

Respondent's argument on purported procedural grounds is not well taken. Respondent cannot deny that it was on notice that the duration of the removed restraining order was to be argued and determined in the district court on the motion to dissolve. In fact, Respondent itself, by its motion to dissolve,

raised the issue of the propriety of allowing the removed order to remain in effect; obviously it was on notice that that issue was to be determined. In fact, Respondent obtained an Order Shortening Time (R. 35) to bring its motion to dissolve on for hearing at the earliest possible time. Respondent clearly had an opportunity to argue the facts when it appeared in the district court on May 27, 1970, and moved to dissolve the restraining order. At that time the district court took Respondent's motion under consideration and ultimately denied it. *Whether or not Respondent exhausted the possible legal grounds for its motion is not controlling. It is only important that Respondent had the opportunity to raise them.* See, *Carpenters' District Council, etc. v. Cicci*, 261 F.2d 5, 8 (6th Cir. 1958).

Respondent errs in its contention that the district court's failure to set forth findings of fact and conclusions of law precludes the court's order denying the motion to dissolve from constituting in effect the granting of a preliminary injunction. It is well established that the absence of findings does not destroy the jurisdictional basis of an injunctive order. *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 816 (6th Cir. 1954); *Philadelphia Mar. L. Ass'n v. International Long. Ass'n*, L. 1291, 365 F.2d 295, 300 (3d Cir. 1966); *Hurwitz v. Hurwitz*, 136 F.2d 796, 799 (D.C. Cir. 1943); *Huard-Steinheiser, Inc. v. Henry*, 280 F.2d 79, 84 (6th Cir. 1960); *Leighton v. One William Street Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965). The purpose of findings is to enable both the party

restrained and the reviewing court to understand the factual and legal basis of the injunctive order. *Urbain v. Knapp Bros. Mfg. Co.*, *supra*, 217 F.2d at 816; *Leighton v. One William Street Fund, Inc.*, *supra*, 343 F.2d at 567. If a full understanding of the basis of the court's order can be gained without the aid of findings, then the district court's failure to make them does not require reversal of the judgment below. *Huard-Steinheiser, Inc. v. Henry*, *supra*, 280 F.2d at 84; *Philadelphia Mar. L. Ass'n v. International Long. Ass'n, L. 1291*, *supra*, 365 F.2d at 300; *Urbain v. Knapp Bros. Mfg. Co.*, *supra*, 218 F.2d at 816.

In the instant case, the district court's order denying Respondent's motion to dissolve (R. 55-56) clearly set forth both the legal issue raised by the motion to dissolve and the court's conclusion and the legal grounds therefor. The Court had no factual issues before it.¹ The order denying the motion to dissolve was neither unclear nor vague to Respondent's prejudice. Therefore, the absence of formal findings and conclusions did not make the court's order fatally defective.

¹It should be noted that at no time did Respondent file an answer to the Employers' complaint for injunction. Therefore, the factual representations set forth in the complaint must be deemed admitted. Rule 8(d), Federal Rules of Civil Procedure, 28 U.S.C.

VII

**THE PROVISIONS OF THE NORRIS-LAGUARDIA ACT
ARE INAPPLICABLE TO THIS CASE**

Respondent asserts that had the restraining order in this case issued in the district court, Section 7 of the Norris-LaGuardia Act would have limited its duration to five days (Brief pp. 29-30). Therefore, Respondent argues, to interpret Section 1450 as allowing a removed restraining order to remain in effect for a longer or indefinite time would subvert the requirements of the Norris-LaGuardia Act (Brief p. 30).

Respondent further argues that the district court's denial of the motion to dissolve did not constitute the granting of a preliminary injunction because certain prerequisites of injunctive relief set forth in Section 7 of the Norris-LaGuardia Act—namely, a hearing with oral testimony by witnesses and the filing of findings of fact and conclusions of law—were not satisfied (Brief pp. 38-39).

Finally, Respondent argues that this is not a case within the scope of *Boys Markets* because the dispute between the parties was not over an arbitrable issue, and that therefore to treat the denial of the motion to dissolve as the issuance of a preliminary injunction would violate Section 4 of the Norris-LaGuardia Act (Brief pp. 44-47).

Respondent's contentions must fall because this is not a labor dispute within the meaning of the Norris-LaGuardia Act. The underlying dispute between the Union and the Employers out of which this action arose concerned the continued existence of the parties'

collective bargaining agreement at the time when the Union took economic action against the Employers. The collective bargaining agreement contained a compulsory grievance procedure for the resolution of disputes between the parties (R. 9-10). The Employers were willing to comply with "each and every act" required of them under the collective bargaining agreement with the Union (R. 11), including the grievance provisions.² Consequently, injunctive relief is available under *Boys Markets*, and the Norris-La-Guardia Act does not apply.

It is well established that the question of the term or continued existence of a contract is an arbitrable issue. *Division No. 892, etc. v. M. K. & O. Transit Lines*, 210 F.Supp. 351, 356 (N.D. Okla. 1962), *reversed on other grounds*, 319 F.2d 488 (10th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963); *Winston-Salem Printing Press & A. U. v. Piedmont Pub. Co.*, 393 F.2d 221 (4th Cir. 1968); *A. Seltzer & Co. v. Livingston*, 253 F.Supp. 509 (S.D.N.Y. 1966), *aff'd*, 361 F.2d 218 (2d Cir. 1966). *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), authorizes injunctive relief against strikes in violation of a contract over matters which the parties are bound to arbitrate. The instant case is within the scope of that decision.

Respondent relies on *Emery Air Freight Corp. v. Local Union 295, Teamsters*, 449 F.2d 586, 591 (2d

²The cases cited by the Union (Brief p. 45) holding that an order enjoining a strike must be conditioned on the employer's submission to arbitration are inapposite here, for the Employers did demonstrate their willingness to comply with all provisions of the agreement, and no order compelling them to do so was necessary.

Cir. 1971), *cert. denied*, 405 U.S. 1066 (1973), for the proposition that the dispute in the instant case is not arbitrable and is therefore subject to the Norris-LaGuardia Act. *Emery Air Freight* is easily distinguishable. The dispute in that case was whether an entirely new contract existed, a question which neither party regarded as arbitrable. *Emery Air Freight Corp. v. Local Union 295, Teamsters, supra*, 449 F.2d at 591. In contrast, the instant case involves the continued existence of a previously established collective bargaining agreement under which the parties are required to submit their disputes to the grievance procedure. Therefore, none of the provisions of Norris-LaGuardia apply to this case.

San Francisco, California,
January 4, 1974.

Respectfully submitted,

WESLEY J. FASTIFF,

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Attorneys for Petitioners.

Syllabus

GRANNY GOOSE FOODS, INC., ET AL. v. BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL NO. 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1566. Argued January 8, 1974—

Decided March 4, 1974

Petitioner employers brought suit in California state court alleging that respondent Union was engaging in a strike in breach of collective-bargaining agreements. The court issued a temporary restraining order on May 18, 1970. Two days later the case was removed to federal court, and on June 4 the District Court denied the Union's motion to dissolve the restraining order. Strike activity then stopped and the labor dispute remained dormant until the Union, after the petitioners had refused to bargain, resumed its strike on November 30, 1970. Two days later the District Court, on petitioners' motion, held the Union in criminal contempt for violating the restraining order. The Court of Appeals reversed on the ground that the order had expired long before November 30, 1970, reasoning that under both state law and Fed. Rule Civ. Proc. 65 (b) the order expired no later than June 7, 1970, 20 days after its issuance, and rejecting petitioners' contention that the life of the order was indefinitely prolonged by 28 U. S. C. § 1450 "until dissolved or modified by the district court." *Held*:

1. Whether state law or Rule 65 (b) is controlling, the restraining order expired long before the date of the alleged contempt, since under the State Code of Civil Procedure a temporary restraining order is returnable no later than 15 days from its date, 20 days if good cause is shown, and must be dissolved unless the party obtaining it proceeds to submit its case for a preliminary injunction, and similarly, under Rule 65 (b), such an order must expire by its own terms within 10 days after entry, 20 days if good cause is shown. Pp. 431-433.

2. Section 1450 was not intended to give state court injunctions greater effect after removal to federal court than they would have had if the case had remained in state court, and it should be construed in a manner consistent with the time limitations of Rule 65 (b). Pp. 434-440.

(a) Once a case has been removed to federal court, federal law, including the Federal Rules of Civil Procedure, controls the future course of proceedings, notwithstanding state court orders issued prior to removal. The underlying purpose of § 1450 (to ensure that no lapse in a state court temporary restraining order will occur simply by removing the case to federal court) and the policies reflected in the time limitations of Rule 65 (b) (stringent restrictions on the availability of *ex parte* restraining orders) can be accommodated by applying the rule that such a state court pre-removal order remains in force after removal no longer than it would have remained in effect under state law, but in no event longer than the Rule 65 (b) time limitations, measured from the date of removal. Pp. 435-440.

(b) Accordingly, the order expired by its terms on May 30, 1970, under the 10-day limitation of Rule 65 (b) applied from the date of removal; hence no order was in effect on November 30, 1970, and the Union violated no order when it resumed its strike at that time. P. 440.

3. The District Court's denial of the Union's motion to dissolve the restraining order did not effectively convert the order into a preliminary injunction of unlimited duration. Pp. 440-445.

(a) That the Union may have had the opportunity to be heard on the merits of the preliminary injunction when it moved to dissolve the restraining order is not the controlling factor, since under Rule 65 (b) the burden was on petitioners to show that they were entitled to a preliminary injunction, not on the Union to show that they were not. Pp. 442-443.

(b) Where a court intends to supplant a temporary restraining order, which under Rule 65 (b) expires by its own terms within 10 days of issuance, with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so, and where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within Rule 65 (b)'s time limits. Here, since the only orders entered were a temporary restraining order and an order denying a motion to dissolve the temporary order, the Union had

no reason to believe that a preliminary injunction of unlimited duration had been issued. Pp. 443-445.

472 F. 2d 764, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and BLACKMUN, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 445.

George J. Tichy II argued the cause for petitioners. With him on the briefs was *Wesley J. Fastiff*.

Duane B. Beeson argued the cause for respondent. With him on the brief were *Victor J. Van Bourg* and *Bernard Dunau*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case concerns the interpretation of 28 U. S. C. § 1450,¹ which provides in pertinent part: "Whenever any action is removed from a State court to a district court of the United States . . . [a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." The District Court held respondent Union in criminal contempt for

¹ Title 28 U. S. C. § 1450:

"Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

"All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

violating a temporary restraining order issued by the California Superior Court on May 18, 1970, prior to the removal of the case from the Superior Court to the District Court. The Court of Appeals reversed, one judge dissenting, on the ground that the temporary restraining order had expired long before November 30, 1970, the date of the alleged contempt. 472 F. 2d 764 (CA9 1973). The court reasoned that under both § 527 of the California Code of Civil Procedure and Fed. Rule Civ. Proc. 65 (b), the temporary restraining order must have expired no later than June 7, 1970, 20 days after its issuance. The court rejected petitioners' contention that the life of the order was indefinitely prolonged by § 1450 "until dissolved or modified by the district court," holding that the purpose of that statute "is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted," 472 F. 2d, at 767, not to "create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court." *Id.*, at 766.

As this understanding of the statute was in conflict with decisions of two other Circuits interpreting § 1450 to preclude the automatic termination of state court temporary restraining orders,² we granted certiorari. 414 U. S. 816 (1973). Finding ourselves in substantial agreement with the analysis of the Ninth Circuit in the present case, we affirm.

² See *Appalachian Volunteers, Inc. v. Clark*, 432 F. 2d 530 (CA6 1970), cert. denied, 401 U. S. 939 (1971); *Morning Telegraph v. Powers*, 450 F. 2d 97 (CA2 1971), cert. denied, 405 U. S. 954 (1972). See also *The Herald Co. v. Hopkins*, 325 F. Supp. 1232 (NDNY 1971); *Peabody Coal Co. v. Barnes*, 308 F. Supp. 902 (ED Mo. 1969).

I

On May 15, 1970, petitioners Granny Goose Foods, Inc., and Sunshine Biscuits, Inc., filed a complaint in the Superior Court of California for the county of Alameda alleging that respondent, a local Teamsters Union, and its officers and agents, were engaging in strike activity in breach of national and local collective-bargaining agreements recently negotiated by multiunion-multiemployer bargaining teams. Although the exact nature of the underlying labor dispute is unclear, its basic contours are as follows: The Union was unwilling to comply with certain changes introduced in the new contracts; it believed it was not legally bound by the new agreements because it had not been a part of the multiunion bargaining units that negotiated the contracts;³ and it

³ This dispute was also the subject of a proceeding before the National Labor Relations Board. See *Airco Industrial Gases*, 195 N. L. R. B. 676 (1972). From the findings of fact in that proceeding, it appears that since 1964 it has been the practice in the trucking industry for representatives of a group of the various Teamsters locals and a group of various trucking employers to negotiate national agreements and supplemental agreements covering local areas. Agreements covering the 1967-1970 period had expired on March 31, 1970. Negotiations between the negotiating committees of the multiunion and multiemployer groups toward a contract for the 1970-1973 period began in January 1970 and continued in February and April. On April 29, the Teamsters negotiating committee approved the national and various supplemental agreements and on April 30, two representatives from each of the Teamsters locals in the multiunion group approved the agreements. Some time thereafter a nationwide referendum vote of all Teamsters members was conducted and it was determined that the employees had ratified the agreements.

The Union claimed it was not bound by the new agreements because it had made a timely withdrawal from the multiunion-multiemployer bargaining unit in a letter of January 28, 1970, to various employers, informing them of the Union's intention to negotiate a separate agreement from the national and supplemental

wanted to negotiate separate contracts with petitioner employers.

The same day the complaint was filed, the Superior Court issued a temporary restraining order enjoining all existing strike activity and ordering the defendants to show cause on May 26, 1970, why a preliminary injunction should not issue during the pendency of the suit. An amended complaint adding petitioner Standard Brands, Inc., was filed on May 18, and a modified temporary restraining order was issued that same day adding a prohibition against strike activities directed toward that employer.

On May 19, 1970, after having been served with the May 15 restraining order but before the scheduled hearing on the order to show cause, the Union and the individual defendants removed the proceeding to the District Court on the ground that the action arose under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185.⁴ On May 20, 1970, an amended removal petition was filed to take into account the modified temporary restraining order of May 18.

Simultaneously with the filing of the removal petition, the defendants filed a motion in the District Court to dissolve the temporary restraining order. The sole ground alleged in support of the motion was that the District Court lacked jurisdiction to maintain the restraining order under this Court's decision in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962), where

agreement. The Board ultimately determined that the Union's withdrawal was not timely because negotiations had begun on January 7, 1970, prior to the attempted withdrawal. We, of course, express no view on this issue.

⁴ In *Avco Corp. v. Aero Lodge No. 735*, 390 U. S. 557 (1968), we held that § 301 (a) suits initially brought in state courts may be removed to the designated federal forum under the federal-question removal jurisdiction delineated in 28 U. S. C. § 1441.

the Court held that notwithstanding § 301's grant of jurisdiction to federal courts over suits between employers and unions for breach of collective-bargaining agreements, § 4 of the Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. § 104, barred federal courts from issuing an injunction against a strike allegedly in violation of a collective-bargaining agreement containing a no-strike clause.

The employers then filed a motion to remand the case to the Superior Court, alleging that the defendants had waived their right to removal by submitting to the jurisdiction of the state court. The Union's motion to dissolve and the employers' motion to remand came on for a hearing on May 27, 1970. The motion to remand was denied from the bench. With respect to the motion to dissolve, the employers brought to the attention of the District Court our grant of certiorari in *Boys Markets v. Retail Clerks Union*, 396 U. S. 1000 (1970), which was interpreted as an indication that the Court would re-examine its holding in *Sinclair*. As *Boys Markets* had been argued here in April 1970, the District Court refrained from taking any action on the motion to dissolve until it received further guidance from this Court. On June 1, 1970, we handed down our decision in *Boys Markets v. Retail Clerks Union*, 398 U. S. 235, overruling *Sinclair* and holding that a district court could enjoin a strike in breach of a no-strike clause in a collective-bargaining agreement and order arbitration under the agreement. Three days later, on June 4, 1970, the District Court entered a brief order denying the motion to dissolve the state court temporary restraining order, citing *Boys Markets*.

Evidently picketing and strike activity stopped and the labor dispute remained dormant after June 4. The flame was rekindled, however, when on November 9,

1970, the Union sent the employers telegrams requesting bargaining to arrive at a collective-bargaining agreement and expressing the Union's continued belief that it was not bound by the national and local agreements negotiated by the multiunion-multiemployer groups. The employers answered that there was no need to bargain because, in their view, the Union was bound by the national and local agreements. The conflict remained unresolved, and on November 30, 1970, the Union commenced its strike activity once again.

The next day the employers moved the District Court to hold the Union, its agents, and officers in contempt of the modified temporary restraining order issued by the Superior Court on May 18. A hearing was held on the motion the following day. The Union's argument that the temporary restraining order had long since expired was rejected by the District Court on two grounds. First, the Court concluded that its earlier action denying the motion to dissolve the temporary restraining order gave the order continuing force and effect. Second, the Court found that § 1450 itself served to continue the restraining order in effect until affirmatively dissolved or modified by the Court. Concluding after the hearing that the Union had willfully violated the restraining order, the District Court held it in criminal contempt and imposed a fine of \$200,000.⁵

⁵ Three-fourths of the fine was conditioned on the Union's failure to end the strike within 24 hours of the Court's order, one-half on failure to end the strike within 48 hours, and one-fourth on failure to end the strike within 72 hours.

Although we do not rest our decision on this point, there seems to be much evidence in the record suggesting that even if the restraining order remained in effect and had been violated, the violation was not willful. A finding that the violation was willful obviously presupposes knowledge on the part of the Union that the order was still in effect. Whether or not the order in fact

II

Leaving aside for the moment the question whether the order denying the motion to dissolve the temporary restraining order was effectively the grant of a preliminary injunction, it is clear that whether California law or Rule 65 (b) is controlling, the temporary restraining order issued by the Superior Court expired long before the date of the alleged contempt. Section 527 of the California Code of Civil Procedure,⁶ under which the

remained in effect on November 30, the Union evidently believed it had expired. Prior to commencing its strike in November, the Union informed the employers through its attorney that it did "not understand from the file that there is presently in effect any order which forbids Local 70 from bargaining with the employer, or from pressing its position that it has a right to bargain for a separate contract. A motion to dissolve a temporary restraining order against economic action was denied by the federal court, but that temporary restraining order has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction.

"Accordingly, the federal court case is pending, but there are no outstanding orders which affect the assertion by Local 70 of rights which it claims. . . ." App. 67.

⁶Section 527 (Supp. 1974), provides:

"An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith.

"No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day

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order was issued, provides that temporary restraining orders must be returnable no later than 15 days from the date of the order, 20 days if good cause is shown, and unless the party obtaining the order then proceeds to submit its case for a preliminary injunction, the temporary restraining order must be dissolved.⁷ Simi-

that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law."

⁷ The time limitation of § 527 has been strictly construed by the California courts. See, e. g., *Smith v. Superior Court*, 64 Cal. App. 722, 222 P. 857 (1923); *Sharpe v. Brotzman*, 145 Cal. App. 2d 354, 302 P. 2d 668 (1956); *Oksner v. Superior Court*, 229 Cal. App. 2d 672, 40 Cal. Rptr. 621 (1964); *Agricultural Prorate Comm'n v. Superior Court*, 30 Cal. App. 2d 154, 85 P. 2d 898 (1938).

Petitioners argue that the time limitation of § 527 is not applicable here because it is operative only with respect to order

larly, under Rule 65 (b),⁸ temporary restraining orders must expire by their own terms within 10 days after entry, 20 days if good cause is shown.

granted without notice to the adverse party. In the present case, petitioners indicate, telephonic notice was given to the Union's counsel on May 15, the day the employers first sought the restraining order, counsel was served with all documents prior to a hearing arranged that day, and counsel was present in the courtroom and presented argument on behalf of the Union at that hearing.

We think it clear from § 527, however, that this kind of informal notice and hearing does not convert the temporary restraining order into a preliminary injunction of unlimited duration under state law. Section 527 provides that when a case comes up for a hearing on a preliminary injunction, the party seeking the injunction "must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application" (Emphasis added.) In providing that no preliminary injunction shall be granted without notice to the opposite party, we think the statute thus contemplates notice of at least two days, with a meaningful opportunity to prepare for the hearing, rather than the kind of informal, same-day notice that was given in this case.

This interpretation of state law is supported on the facts of this case. Even though the Superior Court held some sort of hearing, with Union counsel attending, before granting the temporary restraining order, the court obviously felt that the hearing was not a sufficient basis for ruling on the preliminary injunction. Accordingly, in the same order granting the temporary restraining order, the court set the case for a hearing on the application for a preliminary injunction within the 15-day limit imposed by § 527.

In any event, we need not rest our holding on this interpretation of state law, for even if this restraining order could have had unlimited duration under California law, it was subject to the time limitations of Rule 65 (b) after the case was removed to federal court. See *infra*, at 437-440. Although by its terms Rule 65 (b), like § 527, only limits the duration of restraining orders issued without notice, we think it applicable to the order in this case even though informal notice was given. The 1966 Amendments to Rule 65 (b),

[Footnote 8 is on p. 434]

Petitioners argue, however, that notwithstanding the time limitations of state law, § 1450 keeps all state court injunctions, including *ex parte* temporary restraining

requiring the party seeking a temporary restraining order to certify to the court in writing the efforts, if any, which have been made to give either written or oral notice* to the adverse party or his attorney, were adopted in recognition of the fact that informal notice and a hastily arranged hearing are to be preferred to no notice or hearing at all. See Advisory Committee's Note, 39 F. R. D. 124-125. But this informal, same-day notice, desirable though it may be before a restraining order is issued, is no substitute for the more thorough notice requirements which must be satisfied to obtain a preliminary injunction of potentially unlimited duration. The notice required by Rule 65 (a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition. *Sims v. Greene*, 161 F. 2d 87 (CA3 1947). The same-day notice provided in this case before the temporary restraining order was issued does not suffice. See *Bailey v. Transportation Communication Employees Union*, 45 F. R. D. 444 (ND Miss. 1968). See also C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2949, p. 468 (1973 ed.), reading into Rule 65 (a) a five-day-notice requirement based on Fed. Rule Civ. Proc. 6 (d).

* Rule 65 (b) provides:

"(b) Temporary Restraining Order; Notice; Hearing; Duration.
"A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order,

orders, in full force and effect after removal until affirmatively dissolved or modified by the District Court. To the extent this reading of § 1450 is inconsistent with the time limitations of Rule 65 (b), petitioners contend the statute must control.

In our view, however, § 1450 can and should be interpreted in a manner which fully serves its underlying purposes, yet at the same time places it in harmony with the important congressional policies reflected in the time limitations in Rule 65 (b).

At the outset, we can find no basis for petitioners' argument that § 1450 was intended to turn *ex parte* state court temporary restraining orders of limited duration into federal court injunctions of unlimited duration. Section 1450 was simply designed to deal with the unique problem of a shift in jurisdiction in the middle of a case which arises whenever cases are removed from state to federal court. In this respect two basic purposes are served. Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court, so that pleadings filed

for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

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in state court, for example, need not be duplicated in federal court.⁹ In addition, the statute ensures that interlocutory orders entered by the state court to protect various rights of the parties will not lapse upon removal. Thus attachments, sequestrations, bonds, undertakings, securities, injunctions, and other orders obtained in state court all remain effective after the case is removed to federal court.

But while Congress clearly intended to preserve the effectiveness of state court orders after removal, there is no basis for believing that § 1450 was designed to give injunctions or other orders *greater* effect after removal to federal court than they would have had if the case had remained in state court. After removal, the federal court "takes the case up where the State court left it off." *Duncan v. Gegan*, 101 U. S. 810, 812 (1880). The "full force and effect" provided state court orders after removal of the case to federal court was not intended to be more than the force and effect the orders would have had in state court.¹⁰

⁹ See, e. g., *Madron v. Thomas*, 38 F. R. D. 177 (ED Tenn. 1965); *Murphy v. E. I. Du Pont de Nemours & Co.*, 26 F. Supp. 999 (WD Pa. 1939); *Borton v. Connecticut Gen. Life Ins. Co.*, 25 F. Supp. 579 (Neb. 1938). Of course, repleading may be required by the District Court in appropriate cases. See, e. g., *Foust v. Baltimore & O. R. Co.*, 91 F. Supp. 817 (SD Ohio 1950); *Shell Petroleum Corp. v. Stuenkel*, 25 F. Supp. 879 (Minn. 1938).

¹⁰ We note that § 1450 expressly provides that attachments or sequestrations effected by the state court prior to removal "shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court." Petitioners argue that since post-removal treatment of an attachment effected in the state court was expressly made dependent on the provisions of state law, while no such express provision was made with respect to injunctions issued by the state court prior to removal,

More importantly, once a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal. Section 1450 implies as much by recognizing the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal. This Court resolved this issue long ago in *Ex parte Fisk*, 113 U. S. 713 (1885). There it was argued that an order to take the deposition of a witness issued by the state court prior to removal was binding in federal court and could not be reconsidered by the federal court, notwithstanding its inconsistency with certain federal statutes governing procedure in federal courts. The Court rejected this contention, and said that the predecessor of § 1450

"declares orders of the State court, in a case afterwards removed, to be in force until dissolved or modified by the Circuit Court. This fully recognizes the power of the latter court over such orders. And it was not intended to enact that an order made

Congress must have intended that injunction orders not be controlled after removal by the durational limitations of state law.

As we view the matter, the express provision in § 1450 that state law governs attachments after removal is simply an additional statement of long-settled federal law providing that in all cases in federal court, whether or not removed from state court, state law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered. See Fed. Rule Civ. Proc. 64. Section 1450 makes it clear that this settled rule of federal law applies to removed cases as well. If anything, therefore, it supports our conclusion that the other procedural requirements of federal law, including the time limitations of Rule 65 (b), must be applied to state court temporary restraining orders after the case has been removed to federal court. See *infra*, at 437-440.

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in the State court, which affected or might affect the mode of trial yet to be had, could change or modify the express directions of an act of Congress on that subject.

"The petitioner having removed his case into the Circuit Court has a right to have its further progress governed by the law of the latter court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed." *Id.*, at 725-726.

See also *King v. Worthington*, 104 U. S. 44 (1881); *Freeman v. Bee Machine Co.*, 319 U. S. 448 (1943).

By the same token, respondent Union had a right to the protections of the time limitation in Rule 65 (b) once the case was removed to the District Court. The Federal Rules of Civil Procedure, like other provisions of federal law, govern the mode of proceedings in federal court after removal. See Fed. Rule Civ. Proc. 81 (e).¹¹ In addition, we may note that although the durational limitations imposed on *ex parte* restraining orders are now codified in a federal rule, they had their origin in § 17 of the Clayton Act of 1914, 38 Stat. 737. As the House Report recommending its enactment emphasized, the durational and other limitations imposed on temporary restraining orders were thought necessary to cure a serious problem of "ill-considered injunctions without notice."¹² The stringent restrictions imposed by § 17,

¹¹ See generally *Wright & Miller*, *supra*, n. 7, § 1024, at 108-110, and cases there cited.

¹² See H. R. Rep. No. 627, 63d Cong., 2d Sess., 25 (1914).

and now by Rule 65,¹³ on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, cf. *Carroll v. President and Comm'rs of Princess Anne*, 393 U. S. 175, 180 (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.¹⁴

We can find no indication that Congress intended § 1450 as an exception to its broader, longstanding policy of restricting the duration of *ex parte* restraining orders. The underlying purpose of § 1450—ensuring that no lapse in a state court temporary restraining order will occur simply by removing the case to federal court—and the policies reflected in Rule 65 (b) can easily be accommodated by applying the following rule: An *ex parte* temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force

¹³ Section 17 of the Clayton Act was codified as 28 U. S. C. § 381 (1940 ed.), and was repealed by the Judicial Code Revision Act of 1948, 62 Stat. 997, for the stated reason that it was covered by Rule 65. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A236 (1947).

¹⁴ See, e. g., *Pan American World Airways v. Flight Engineers' Assn.*, 306 F. 2d 840 (CA2 1962); *Smotherman v. United States*, 186 F. 2d 676 (CA10 1950); *Sims v. Greene*, 161 F. 2d 87 (CA3 1947). This basic purpose is implicit in Rule 65 (b)'s requirement that after a temporary restraining order is granted without notice, "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character"

longer than the time limitations imposed by Rule 65 (b), measured from the date of removal.¹⁵

Applying our holding to the present case is simple. The temporary restraining order was issued by the Superior Court on May 18, 1970, and would have remained in effect in the state court no longer than 15 days, or until June 2. The case was removed to federal court on May 20, 1970. The temporary restraining order therefore expired on May 30, 1970, applying the 10-day limitation of Rule 65 (b) from the date of removal. Accordingly, no order was in effect on November 30, 1970, and the Union violated no order when it resumed its strike at that time.

III

We now turn to petitioners' argument that, apart from the operation of § 1450, the District Court's denial of the Union's motion to dissolve the temporary restraining order effectively converted the order into a preliminary injunction of unlimited duration. The Court of Appeals rejected this argument out of hand, stating that "[t]he Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate." 472 F. 2d, at 767. We reach essentially the same conclusion.

¹⁵ The following two illustrations should suffice to clarify the holding. Where the state court issues a temporary restraining order of 15 days' duration on Day 1 and the case is removed to federal court on Day 13, the order will expire on Day 15 in federal court just as it would have expired on Day 15 in state court. Where, however, a state court issues a temporary restraining order of 15 days' duration on Day 1 and the case is removed to the federal court on Day 2, the restraining order will expire on Day 12, applying the 10-day time limitation of Rule 65 (b) measured from the date of removal. Of course, in either case, the District Court could extend the restraining order for up to an additional 10 days, for good cause shown, under Rule 65 (b).

As indicated earlier, once a case has been removed to federal court, its course is to be governed by federal law, including the Federal Rules of Civil Procedure. Rule 65 (b) establishes a procedure whereby the party against whom a temporary restraining order has issued can move to dissolve or modify the injunction, upon short notice to the party who obtained the order. Situations may arise where the parties, at the time of the hearing on the motion to dissolve the restraining order, find themselves in a position to present their evidence and legal arguments for or against a preliminary injunction. In such circumstances, of course, the court can proceed with the hearing as if it were a hearing on an application for a preliminary injunction. At such hearing, as in any other hearing in which a preliminary injunction is sought, the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied and its likelihood of success on the merits.¹²

On the other hand, situations might arise where the parties are not prepared and do not intend at the hearing on the motion to dissolve or modify the temporary restraining order to present their cases for or against a preliminary injunction. In such circumstances, the appropriate procedure would be for the district court to deal with the issues raised in the motion to dissolve or modify the restraining order, but to postpone for a later hearing, still within the time limitations of Rule 65 (b), the application for a preliminary injunction. See generally C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2954, p. 523 (1973 ed.).

¹² See, e. g., *Robert W. Stark, Jr., Inc. v. New York Stock Exchange*, 466 F. 2d 743 (CA2 1972); *Crowther v. Senborg*, 415 F. 2d 437 (CA10 1969); *Garlock, Inc. v. United Seal, Inc.*, 404 F. 2d 256 (CA6 1968).

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In the present case we think it plain that the hearing on the Union's motion to dissolve the restraining order cannot be considered to be a hearing on a preliminary injunction, and that the District Court's order denying the motion to dissolve cannot reasonably be construed as the grant of a preliminary injunction. There is no indication in the record that either party or the District Court itself treated the May 27 hearing as a hearing on an application for a preliminary injunction. The employers made no attempt at that time to present their case for a preliminary injunction. Likewise, the Union made no attempt at that time to present its defense that it was not bound by the new national and local agreements because it had made a timely withdrawal from the multi-union bargaining unit negotiating said contracts. See n. 3, *supra*. The court itself did not indicate that it was undertaking a hearing on a preliminary injunction. As far as we can tell, it never addressed itself at the hearing to the various equitable factors involved in considering a preliminary injunction, but only considered the employers' argument that the case should be remanded to the state court because the right to remove had been waived by the Union's appearing in the state proceeding and the Union's argument that the temporary restraining order should be dissolved for want of jurisdiction under the *Sinclair* holding.

We cannot accept petitioners' argument that the controlling factor is that the Union had the *opportunity* to be heard on the merits of the preliminary injunction when it moved in the District Court to dissolve the temporary restraining order. Rule 65 (b) does not place upon the party against whom a temporary restraining order has issued the burden of coming forward and presenting its case against a preliminary injunction. To the contrary, the Rule provides that "[i]n case a tempo-

rary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time . . . and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order." The burden was on the employers to show that they were entitled to a preliminary injunction, not on the Union to show that they were not.

Even were we to assume that the District Court had intended by its June 4 order to grant a preliminary injunction, its intention was not manifested in an appropriate form. Where a hearing on a preliminary injunction has been held after issuance of a temporary restraining order, and where the District Court decides to grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction, accompanied by the necessary findings of fact and conclusions of law.¹⁷ As stated by the Second Circuit:

"The fact that notice is given and a hearing held cannot serve to extend indefinitely beyond the period limited by [Rule 65(b)] the time during which a temporary restraining order remains effective. The [Rule] contemplates that notice and hearing shall result in an appropriate adjudication;

¹⁷ Fed. Rule Civ. Proc. 52(a) provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." Where a temporary restraining order has been continued beyond the time limits permitted under Rule 65(b), and where the required findings of fact and conclusions of law have not been set forth, the order is invalid. See, e. g., *National Mediation Bd. v. Air Line Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963); *Sims v. Greene*, 160 F. 2d 512 (CA3 1947).

i. e., the issuance or denial of a preliminary injunction, not in extension of the temporary stay." *Pan American World Airways v. Flight Engineers' Assn.*, 306 F. 2d 840, 842 (1962) (footnotes omitted). See also *Sims v. Greene*, 160 F. 2d 512 (CA3 1947).

As the fine imposed in this case exemplifies, serious penalties can befall those who are found to be in contempt of court injunctions. Accordingly, one basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits."

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *International Longshoremen's Assn. v. Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967).

It would be inconsistent with this basic principle to countenance procedures whereby parties against whom an injunction is directed are left to guess about its intended duration. Rule 65 (b) provides that temporary restraining orders expire by their own terms within 10 days of their issuance. Where a court intends to supplant such an order with a prelimi-

¹⁹ Rule 65 (d) provides:

"Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained"

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nary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65 (b). Here, since the only orders entered were a temporary restraining order of limited duration and an order denying a motion to dissolve the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued.

Since neither § 1450 nor the District Court's denial of the Union's motion to dissolve the temporary restraining order effectively converted that order into a preliminary injunction, no order was in effect on November 30, 1970, over six months after the temporary restraining order was issued.¹⁹ There being no order to violate, the District Court erred in holding the Union in contempt, and the judgment of the Court of Appeals reversing the District Court's adjudication of contempt must be

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring in the judgment.

I agree with the Court that the judgment of the Court of Appeals for the Ninth Circuit in this case should be affirmed, since there was no injunctive order in effect at the time that respondent's allegedly contemptuous conduct occurred. But I do not join that portion of the Court's opinion which lays down a "rule" for all cases

¹⁹ In view of our disposition of the case, we need not and do not reach respondent's argument that notwithstanding *Boys Markets v. Retail Clerks Union*, 398 U. S. 235 (1970), the temporary restraining order issued in this case should be governed by the 5-day limit of § 7 of the Norris-La Guardia Act, 29 U. S. C. § 107.

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involving 28 U. S. C. § 1450,¹ the statute which all parties agree is controlling in the case before us. In my view, the announcement of this "rule" is neither necessary to the decision of this case nor consistent with the provisions of the statute itself.

The Court persuasively demonstrates in its opinion that the temporary restraining order issued by the California Superior Court had expired by its own terms long before the alleged contempt occurred. And I see nothing in the language or legislative history of 28 U. S. C. § 1450, providing that "[a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court," which would indefinitely extend the Superior Court's restraining order beyond the time of its normal expiration under state law. Since the temporary restraining order, had the case remained in state court, concededly would have expired in early June, respondent's actions in November and December could not have constituted a contempt of that order.

The Court also persuasively demonstrates that none of the proceedings occurring after removal of the case to the United States District Court had the effect of converting the subsisting state court temporary restraining order into a preliminary injunction of indefinite duration. Those proceedings addressed markedly different issues and certainly did not give the state court order a new, independent federal existence.

Having said this much, the Court has disposed of the case before it. The opinion then goes on, however, to devise a "rule" that

"[a]n *ex parte* temporary restraining order issued by

¹ The relevant provision of 28 U. S. C. § 1450 reads:

"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65 (b), measured from the date of removal." (Footnote omitted.)

But the determination that mere removal of a case to a federal district court does not extend the duration of a previously issued state court order past its original termination date makes quite unnecessary to this case any further discussion about time limitations contained in Fed. Rule Civ. Proc. 65 (b). More importantly, the second clause of the "rule" devised by the Court seems quite contrary to the specific language of 28 U. S. C. § 1450.

The Court apparently bases this latter clause of the "rule" upon the observation that "respondent Union had a right to the protections of the time limitation in Rule 65 (b) once the case was removed to the District Court." While this premise probably has a good deal to recommend it as a matter of practicality or of common sense, the language of the statute gives no hint that rules of practice governing issuance of federal injunctions in the first instance were automatically to be incorporated in applying its terms. The statute says that the state court's temporary restraining order "shall remain in full force and effect until dissolved or modified by the district court." This Court's "rule," however, says that it shall *not* remain in full force and effect, even though not dissolved or modified by the District Court, if it would have a life beyond the time limitations imposed by Rule 65 (b).

I think it likely that the interest in limiting the duration of temporary restraining orders which is exemplified in Rule 65 (b) can be fully protected in cases removed

to the District Court by an application to modify or dissolve a state court restraining order which is incompatible with those terms.² Such a procedure would be quite consistent with § 1450, which specifically contemplates dissolution or modification by the District Court upon an appropriate showing, in a way that the "rule" devised by the Court in this case is not. It is unlikely that many orders issued under rules of state procedure, primarily designed, after all, to provide suitable procedures for state courts rather than to frustrate federal procedural rules in removed actions, would by their terms remain in effect for a period of time far longer than that contemplated by the comparable Federal Rule of Civil Procedure. But in the rare case where such a condition obtains, it is surely not asking too much of a litigant in a removed case to comply with § 1450 and affirmatively move for appropriate modification of the state order.

Therefore, although I cannot subscribe to the rule which the Court fashions to govern cases of this type, I concur in its conclusion that respondent's activity in November and December 1970 did not violate any injunctive order which was in force at that time.³

² Indeed, respondent's motion to dissolve the state court order because of the prohibitions contained in the Norris-LaGuardia Act, 29 U. S. C. § 104, was just such a motion. That motion was denied by the District Court, however, and respondent made no further effort to obtain a modification or dissolution of the state restraining order prior to its expiration.

³ I see no occasion for the Court's rather casual speculation, contained in n. 5 of its opinion, that the respondent's violation of the order, even were it effective at the time of its later conduct, may not have been "willful." The Court has concluded that the order was *not effective* at that later time, and it can serve no useful purpose to speculate about the sufficiency of the evidence with respect to violation of a defunct order.

Per Curiam

DeMARCO v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73-5684. Decided March 18, 1974

A Government witness, who had been indicted with petitioner, testified at petitioner's trial that no promises had been made to the witness regarding disposition of his case. Petitioner, for the first time on appeal of his conviction, contended that the witness' testimony was false on the basis of the prosecutor's statements at the subsequent sentencing hearing of the witness, who had pleaded to a lesser charge in a superseding indictment. The Court of Appeals, after examining the transcript of the sentencing hearing, concluded that no leniency promise had been made prior to the witness' testimony at petitioner's trial. *Held*: Had there been a promise to the witness before he testified, a reversal of petitioner's conviction would be required, *Giglio v. United States*, 405 U. S. 150, and *Napue v. Illinois*, 360 U. S. 264, and the factual issue of whether the plea bargain that obviously was made with the witness preceded or followed petitioner's trial should have been resolved by the District Court after an evidentiary hearing. Certiorari granted; vacated and remanded.

PER CURIAM.

At petitioner's trial, a Government witness who had been indicted with petitioner, testified that the Government had made no promises to him with respect to the disposition of his case. Petitioner was convicted and he appealed. Meanwhile, the witness had pleaded to a lesser charge contained in a superseding indictment; and at his sentencing hearing, the United States Attorney made certain statements that petitioner interpreted as proving that promises had been made to the witness prior to his testimony and that the witness had testified falsely at petitioner's trial. Without presenting the matter to the District Court, petitioner pressed the question in the

Court of Appeals. That court accepted the tendered issue, examined the transcript of the hearing at which the witness was sentenced, considered the Government's response in the Court of Appeals and, although the prosecutor's remarks were deemed ambiguous and the question thought to be a "close" one, concluded that no promises had been made to the witness prior to the witness' testimony at petitioner's trial.

Unquestionably, had there been a promise to the witness prior to his testimony, *Giglio v. United States*, 405 U. S. 150 (1972), and *Napue v. Illinois*, 360 U. S. 264 (1959), would require reversal of petitioner's conviction. It is also clear that there was a plea bargain between the witness and the Government at some point, the question being whether it was made after or before petitioner's trial. This factual issue was dispositive of the case, and it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing.* We therefore grant the petition for certiorari and the motion to proceed *in forma pauperis*, vacate the judgment of the Court of Appeals, and remand the case to that court with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

*The Government's response to the petition for certiorari agrees that factfinding is the basic responsibility of district courts, rather than appellate courts, and that the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court. See, e. g., *General Electric Credit Corp. v. Robbins*, 414 F. 2d 208, 211 (CA8 1969); *Yanish v. Barber*, 232 F. 2d 939, 946-947 (CA9 1956). See also 5A J. Moore, *Federal Practice* ¶ 52.06 [2] n. 1 (2d ed. 1974).

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

Petitioner was convicted in the District Court of trafficking in illegal narcotics in violation of the provisions of 21 U. S. C. § 174 (1964 ed.). The Court of Appeals summarily rejected petitioner's attacks on the sufficiency of the evidence to convict him, and dealt in detail only with the *Giglio* issue upon which this Court decides to vacate and remand for consideration by the District Court. As the Court notes, this was a "factual issue," ante, at 450, and raises no question whatever of general importance in the law. Commonly I would expect this petition to be denied for those reasons.

The Solicitor General, however, has filed a response in this Court which, though entitled "Memorandum in Opposition," incorporates in a footnote a backhanded invitation to the Court to follow the course which it has now taken. It is well established that this Court does not, or at least should not, respond in Pavlovian fashion to confessions of error by the Solicitor General. See, e. g., *Young v. United States*, 315 U. S. 257 (1942); *Gibson v. United States*, 329 U. S. 338, 344 n. 9 (1946). I believe there could not be a plainer case than this one for the invocation of the doctrine of invited error. For whatever may be the proper allocation of factfinding responsibilities between the Court of Appeals and the District Court, petitioner deliberately chose to raise this largely factual issue for the first time in the Court of Appeals and to seek decision upon it there. That the Court of Appeals responded to the invitation is scarcely grounds for any claim of error here. I would deny certiorari.